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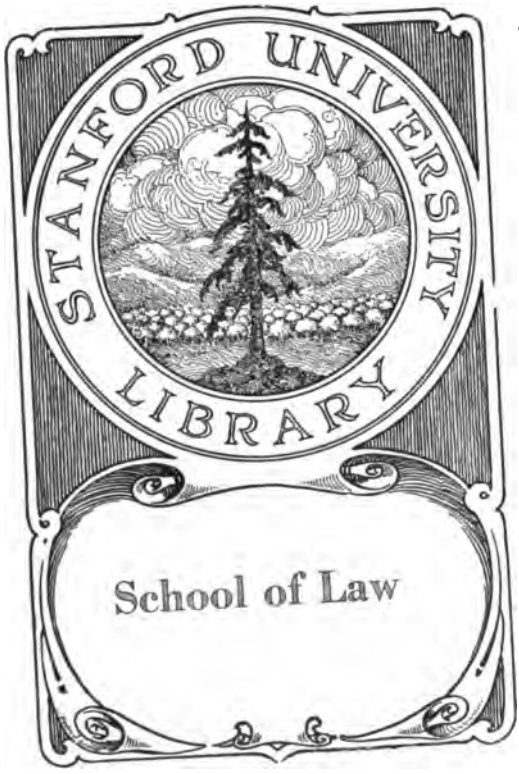
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TABLE OF CASES REPORTED AND CITED.

A. PAGE.

Abbotts v Barry, 5 Moore 98, 2 Br. & B. 369..... 59
Abel v Hilts, Ch. Cham., The Referee 363
Abell v Glen, C L. Cham..... 126
Adams v Adams, L R. 14 Eq. 246.... 218
Addison v Cox, L R. 8 Ch. 76..... 329
Ahrens v McGillivat, C P., Easter Term..... ... 362
Alchin's Trusts, In re, L R. 14 Eq. 230..... 218
Alden v New York Central Railway, 12 Smith 102.. 174
Alexander v Vanderze, L R. 7 C P. (Ex. Ch.) 530.... 215
Allen v Atkinson, L R. 1 P. & D. 655, 20 L T R. N S. 404..... 132
Allen et al. v Chisholm, Q B. H T..... 310
Allen v London S W. & R W., L R., 6 Q B. 65..... 172
Allgood v Blake, 21 W R. 63..... 250
Allgood v Blake, L R. 7 Ex. 339..... 216
Aloo, *Exparte* 11 Jur. 858..... 250
Alrich v Cooper, 8 Ves. 392..... 156
Allsopp v Wheatcroft, L R. 25 Eq. 59..... 301
Ambler v Boulton, L R. 14 Eq. 427..... 219
Andrews, In re, L R., 8 Q B. 153..... 325
Annesley v Earl of Anglesea, 17 St. Tr. 1276..... 38
Anon Dyer, 6 A..... 348
Anon Dyer, 45 A ..... 348.. 350
Anon Dyer, 66 347
Anon Dyer, 152..... 346
Anon Godb, 2.. 349
Anon, 3 Leon 67..... 348
Anon, Moor 91..... 349
Anon, 3 N. P. C. 19 Dyer, 88 A..... 3
Ansell v Smith, C L. Cham., Mr. Dalton..... 191
Appeals from Court of Revision of Cobourg, Assessment Case. Boswell, Co. J..... 294
Appeals from Court of Revision of Kingston, Re-Assessment cases. Burrows, Co. J..... 259
Applegarth v Graham, 7 U C. C. P. 171..... 28
Appowel v Monnoux, Moor 97, 98. 348
Armitsted v Durham, 11 Beav. 428..... 53
Armstrong v Deedes, Ch. Cham., The Referee..... 363
Armstrong v Stokes, L R. 7 Q B. 598..... 96
Armsworth v South Eastern Railway, 11 Jur. 758... 175
Arnold v Holbrook, L R. 8 Q B. 96..... 330
Arnot v Bradley, Com. Pleas, H T. 1873..... 190
Ash, In re, L R. 7 Ch. 636 90
Ashley v Sedgwick, 21 W R. 455..... 306
Attorney-General v Campbell, L R. 5 H. L. 524..... 97
Attorney-General v Chelsea W. W. Co.—Fitzgibbon, 159..... 193
Attorney-General v Dakin, 18 W R. 1117..... 178
Attorney-General v McLachlin, 5 Prac. R. 73..... 250
Attorney-General v Rolloff, 10 Ex. 84..... 142
Austin v Great Western Railway, L R. 2 Q B. 442, ...178.. 203
Austin v Manchester, Sheffield & L R. W. 10 C B. 454..... 145
Australian Steam Navigation Co. v. L R., 4 P. C. 222 91
Aylesford v. Morris..... 344
Ayres v Harness, 1 Ohio 368..... 46

B.

B. & S. M., In re Attorneys, C L. Cham., 1871—Mr. Dalton..... 23
Bain v McConnell, Ch. Cham. —The Referee..... 313
Bainbrigge v Baddeley, 12 Beav. 152..... 53
Baker v Black, 8 L T. Ex. 308..... 23
Baldwin v Casella, L R. 7 Ex. 325..... 93
Bamford v Turnley, 3 Best & Smith, 75..... ... 342
Bank of Commerce v White, C L. Cham.— Mr. Dalton..... 191
Banks v Goodfellow, 22 L T. R M S. 813; 5 L R. Q B. 549 319
Barfield v Loughborough, L R. 8 Ch. 1..... 323
Baron v Husband, 4 B & Ad. 611, 612..... 53-62
Barrett v Power, 13 Jur. 153..... 250
Bartlett v Wood, 9 W R. 817 307
Barton's Hill Coal Co. v Reid & McGuire..... 121
Bate, Ex rel. v Corporation of the City of Ottawa. Com. Pleas, H T. 1873..... 188
Bateman v City of Hamilton, Q B. H T..... 309
Batut v Hartley, L R. 7 Q B. 594..... 90
Bayley v Manchester, S. & L. R. Co., L R. 7 C. P. 415..... 96, 146, 148
Bayley v Manchester, S. & L. R. Co., L R. 8 C P. 148; s. c. L R. 7 C P. 415; 7 Am. Law Rev. 297. 328
Beadel v Perry, L R. 3 Eq. 465: 15 Rep. N S. 345... 264
Beasley v D'Arcy Scholes & Loff, 403..... 127
Beattie v Lord Ebury, L R. 7 Ch. 777..... 220
Beattie v Lord Ebury, (Notes of the Week, Aug. 10, 1872)..... 23
Becher v Great Eastern Railway, L R. 5 Q B. 241. 82, 146
Bechervaise v Lewis, L R. 7 C P. 372 91
Beckham v Drake, 9 M. & W. 95; 1 Wm. Saund, 477..... 18, 19, 20
Beegle v Wentz, 5 P. F. Smith 309..... 298
Behrens v Allen, 8 Jur. N S. 118..... 317
Bell v Cameron, 5th Sept. 1872..... 52
Bemis v Wilder, 100 Mass. 446..... 348
Bennett v Herring, 3 C B. N S. 470 358
Benson v Welby, 2 Saund. 155, 6th Ed.; 2 Wm.'s Notes to Saund. 454..... 344
Berry v Gibbons, L R. 15 Eq. 150..... 328
Berry v Taunton, Cro. Eliz. 331..... 347
Best and Another v Hill, 27 L T. N S. 490, Nov. 14, 1872..... 126
Beulah Park Estate, In re. Sargood's Claim, L R. 15 Eq. 43..... 326
Bickerdike v Bollman, 1 T R. 405, 2 S M. L C. 45.. 61
Bingham v Allport, 1 N. & M. 398..... 25
Bird v Brown, 4 Ex. 798..... 20
Birkett v Whitehaven Junction R. W., 4 H. & N. 730, 732..... 175
Birks v Allison, 9 Jur. N S. 694, 695; 13 C B. N S. 12, 23..... 153
Bishop of Winchester v Payne, 11 Ves. 103..... 313
Bissix v Bissix, 3 Burr. 1729..... 343
Blake v Midland R. W., 18 Ad. & Ell. N S. 93..... 175
Blake v Jarvis, 17 Grant, p. 294 40
Bleeker v Smith, 13 Wend. 330..... 358
Blower v Great Western R'y Co., L R. 7 C P. 655... 213
Bolton v Corp. of Liverpool, 1 My & K. 88..... 359
Booth v Alcock, 28 L T. N S. 221..... 263
Booth v Turle, 21 W R. 721 306

PAGE.

Bosanquet, Re. 2 Robart 577 132
Bowen v Barlow, L R. 8 Ch. 171 302
Bowen and Wife v Shears, N. S. R. 56
Bowie v Buffalo, B. & G. R W. 7 C P. 191 143
Boyce v Rossborough, 6 H. of L., Cas. 4 320
Boyle v Tamlyn, 6 B. & C. 329 65
Boynton v Housler et al., U. S. R. 297
Bradbury v Hotten, L R. 8 Ex. 1 301
Bradstreet & Son v Everson, Preston & Co., U. S. R. 161
Brecon Markets Co. v Neath & Brecon R'y Co., L R. 8 C P. (Ex. Ch.) 157; s. c. L R. 7 C P. 550; 7 Am. Law Rev. 485 330
Brett v Smith, 1 P R. 309 226
Bridges v North London R. W. Co., L R. 6 Q B. 377. 205
Briggs, Ex parte, 18 L. J C P. 184 26
Briggs v Grand Trunk R., 24 U C. Q B. 510 78
Brinsmead v Harrison, L R. 7 C P. (Ex. Ch.) 547; s. c. L R. 6 C P. 584; 6 Am. Law Rev. 496 218
Brinsmead v Harrison, L R. 7 C P. 553 343
Bristol v Winsmore, 1 B. & C. 514 58
British & Amer. Telegraph Co. v Albion Bank, L R. 7 Ex. 122. and note to 5 Ir. L T R. 192 59
British & American Tel. Co. v Colson, L R. 6 Ex. 108 ..... 76, 135
British & American Telegraph Co., Re L R. 14 Eq. 316 214
Bronte Harbour v White, C P. Easter Term 362
Brooke v Pickwick, 4 Bing 218 81
Brookman v Smith, L R. 7 Ex. (Ex. Ch.) 271, 274; s. c. L R. 6 Am. Law Rev. 87 ..... 93, 156
Browne v Collins, 21 W R. 222 143
Brown v Compton, 8 T R, 430 343
Brown v Dollard, Ch. Cham., The Chancellor 313
Browne v Hope, L R. 14 Eq. 343 218
Brown v Lockhart, 4 Jur. 168 250
Brown v Muller, L R. 7 Ex. 319 92
Browning v Beston, Plowd 131 351
Broughton & Marston v Knight et al., 28 L T. N S. 502 319
Brumfit v Bremner, 9 C B. N S. 1 28
Brummell v McPherson, 14 Ves. 173, 176 345-346
Bruty v G. T. R. Co., 32 U C. Q B. 66 ..... 81, 83
Buchanan v Young et al, C P. E T 312
Budge v Gummow, L R. 7 Ch. 719 222
Buel v Fisher, Ch. Cham.—The Referee 160
Bull v Harper, Ch. Cham.—The Referee 159
Buller J., Dictum of, 1 B. & P. 101 n 17
Bullitt v Baird, Supra 163
Burbank v Whitney, 24 Pick. 155 156
Burgess v Great Western R. W., 32 L T. 76 208
Burt v Hillyar, L R. 14 Eq. 160 92
Butcher v London & S. W. R. W., 16 C B. 13 145
Buxton v North Eastern R. W. Co., 3 Q B. L R. 549. 210
Buxton v Rust, L R. 7 Ex. (Ex. Ch.) 279; s. c. L R. 7 Ex. 1; 6 Am. Law Rev. 485 94

C.

Cahill v London & N. W. R. Co., 10 C B. N S. 154 ... 82
Caldbeck v Boon, C P. Trin. T. 1872 26
Calder v Dobell, L R. 6 C P. 486 20
Calhoun v Thompson, 2 Moll. 287 251
Cameron v Eagar, Ch. Cham.—The Referee 363
Camidge v Allenby, 6 B. & C. 385 61
Camp v The Tel. Co., 2 Metcalf Ry. 164 135
Campbell v R. C. Bank, Ch. Cham.—The Referee 160
Canliffe & Ormerod v Cross, 3 S. & T. 37 132
Cardiff v Piercy, Ir., Cir. R. 520 250
Carlisle v Whaley, L R. 2 E. & I. App. 419 250
Carnegie v Rutherford, C L. Cham.—Mr. Dalton 212
Carpue v London B. & S. C R'y, 5 Ad. & E N S. 747.. 173
Carr v Atkinson, L R. 14 Eq. 397 220

PAGE.

Carr v Lancashire & Yorkshire R. W., 7 Ex. 707 145
Carr v Moffatt, Ch. Cham.—January 4th, 1873, V. C. Blake 52
Cary v Hills, L R. 15 Eq. 79 ..... 291, 325
Caswell v Boston & Worcester Q. W., 98 Mass 208
Cattanach v Urquhart, Chan. Cham.—The Referee, Blake V. C. 212

C.

Chalmers, In re Edwards, L R. 8 Ch. 289 300
Chambers v Unger, C L. Cham.—Mr. Dalton 212
Chamberlain v McDonald, 14 Grant 447 170
Chamberlayne v Brockett, L R. 8 Ch. 206 328
Chanter v Leese, 4 M. & W. 295 18
Chapman, In re L R. 15 Eq. 75 325
Chapman v Rose, U. S. R. 236
Chapple v Durston, 1 Cromp & J. 9 156
Charitable Corp. v Sutton, 3 Atk. 400., 259; 7 Beav. 301 184
Charlton's Case, 2 M & Cr. 316 7
Cheltenham Waggon Company, L R. 8 Eq. 580 7
Cherry v Thompson, L R. 7 Q B. 573 ..... 93, 334
Childers v Wooler, 2 E & E. 287 61
Childs v Great Western R W. 6 U C. C. P 291 149
Chipman v Emeric, 5 Cal. 49 356
Chorlton v Lings, 17 W. R. 291 250
Christie v Griggs, 2 Camp. 79 173
Christofferson v Hansen, L R. 7 Q. B 509 91
Churlton v Frewson, 13 L T. N. S. 491 313
Clarisa v Ellis, Ch. Cham., The Referee 363
Clarke v Clarke, L R. 1 Ch. app. 16, 13 L. T. R. N. S. 482 128
Clarke v Parker, 19 Ves. 20 178
Clarke v Reilly, Ir. C L. R. 2, 422 338
Clarke v Willott, L. R. 7 Ex. 313 98
Cleare v Cleare, L R. 1 P & M. 655, 20 L T. R. N. S. 457 132
Clegg v Cotton, 3 B & P. 242 61
Cleland's Case, L R. 14 Eq. 387 220
Clements Re, 17 Sol. J. 651 225
Clough v L & N. W. Ry; L R. 7 Ex. 32, 34 60
Clough v L & N. W. Ry., L R. 7 Ex. 26; 14 L J. Ex. 17, 20 W R. 189, 25 L T. N. S 708 61
Cobbett v Woodward, L R. 14 Eq. 407 215
Cochrane v Camack, 7 Ir. C L. R. 10 338
Cockle v London & S E. R. W. Co., L R. 7 C P. 721 *(Ex. Ch.) 205
Cockle v London & South Eastern Ry. Co., L R. 7 C P. (Ex. Ch.) 321; s. c. L R. 5 C P. 457; 5 Am. Law Rev. 299 96
Cockerell v Aucompte, 26 L J. C. P. 194, 2 C B. N. S. 440, 184 258
Coggill v Hart & N H. R. R. 3 Gray 545 347
Cohen v O'Donovan, 3 Ir. L R. 726 201
Cole, In re L R. 14 Eq. 178 90
Cole v Green, 6 M & G. 872 28
Collett v London & N. W. R. W. 16 Ad. & El. U. N. S. 984 172-173
Col. & Ind. C R. W. Co v Farrell, 31 Ind. 408 205
Colyear v Mulgrave, 2 Keen, 9; 5, C. B, N. S. 265, 8 A. & E. 743. Ro. Abr. 1, 593 pl. 7; Y. B. 17 E. 45 18
Combe v Hughes, L R. 14 Eq. 415 218
Commonwealth v Alger, 7 Cush. 78, 90 341-342
Commonwealth v Anthes, 5 Gray 212 159
Commonwealth v Gallager, 10 Gray 241 158
Commonwealth v Roby, 12 Pick 509 341
Commonwealth v Webster, 5 Cush. 306 341
Contract Corporation, In re, Gooch's Case L R. 14 Eq. 454 214

PAGE.

Commonwealth v Yorke, 9 Met. 111 341
Cooledge v Bank of Montreal, Pract. Ct., Wilson J. 237
Cooke v Forbes, 17 L T. R. N. S. 371, L R. 5 Eq. 166 128-130
Cooper v Chitty, 1 Burr 33 156
Cooper v Slade, 5 H. of L. 772 339
Cope v Barber, L R. 7 C P. 404 342
Coppinger v Bradley, 5 Ir. L R. 274 178
Coote v Whittington 201
Cornish v Clark, L R. 14 Eq. 184 98
Corsman v Eastern Counties Ry. 4 H & N. 781 209
Corp. of Folkestone v Woodward, L R. 15 Eq. 159 ... 329
Cory v Churchwardens of Greenwich, L R. 7 C P. 499 221
Cory v Scott, 3 B & Add. 625 61
Cothay v Fennell, 10 B & C. 671, 20 B & C. 6 19
Cotton v Van Sittart, Chan. Ch., The Referee 312
Cottrell v Cottrell, L R. 2 P & D. 397 94
County Judge of Perth & J. L. Robinson, 12 U C. C. P. 252 263
Couston v Chapman, L R. 2 H L. Sc. 250 221
Cox v Livingston, 2 W & S. 103 162
Cragoe v Jones, L R. 8 Ex. 81 329
Craig v G. W. R. R Co., 24 U C. Q. B. 504 79-80
Crampton v The Verna Railway Company, L Rep. 7 Ch. App. 562 ..... 22 97
Crawford v Curragh, 15 U C. C. P. 55 199
Credit Valley R. & County of Peel Bonus, Re C L. Cham.—Galt, J 191
Crenver & Wheal, Abr. U M. Co., In re Wilson ex parte, L R. 8 Ch. 45 302
Creswick v Thompson, Ch. Cham., The Referee 192
Crocker v Old South Soc., 106 Mass. 489 358
Crofter v Metropolitan R. Co., L R. 1 C P. 300 78
Cross v Williams, 7 H & N. 675 184-258
Crossley v Shaw, 2 W. Bl. 1088 274-341
Crump v Lambert, L R. 3 Eq. 409, 17 L T. R. N. S. 133 128
Cubley's Trusts, 21 W. R. 170 37
Cullen v Doe, 11 Ad. & E. 1008 57
Cummins v McLean et al, 2 Pike (Ark.) R. 402 163
Cumming v Strand, 5 H & N. 95 61
Currier's Co. v Corbett, 12 L T. R. N. S. 169, 13 L T. R. N. S. 154 128
Curteis Trusts. B. Re, L R. 14 Eq. 217 98
Curtis v Embury, L R. 7 Ex. 369 222
Curtis v Grand T. R. W., 12 U C. C. P. 90 148

D.

Dain v Gossage, C L. Ch.—Mr. Dalton 165-193
Dakin v Williams, 17 Wend. 447 ; 22 ib 201 345-357
Dalglish v McCarthy, 19 Grant 578 307
Dalton v South Eastern R. W., 4 C B. N. B. 296 176
Daniel v Stephney, L R. 7 Ex. 327 93
Daniels v Metropolitan R. W. Co., L R. 3 C P. 591 (Ex. Ch.) 204
Darley v Ousley 234
Dawson v Manchester S & L. Ry., 5 L T. N. S. 682 .. 173
Dawson v Midland Ry. Co , L R. 8 Ex. 8 327
Davidson v Boyes, Ch. Cham., Spragge, C. 159
Davidson v Sage 170-199
Davis et al v McPherson, Q. B. H. T. 308
Davis v Great Western R. W., 20 U C. Q. B. 27 148
Davis v Kennedy, Ir. L. R. 3 Eq. 56 250
Davis v Moss, 38 Pa. St. 346-353 351
Dean of St. Asaph's Case 234
De Blaquiere v Armstrong, Ch. Cham., The Referee 363
De Blaquiere v Becket, 8 U C. C. P. 167 28
Deeks v Stanhope, 1 Jur. N. S. 413 52-53
Deering v Lawler, 7 Ir. C. L. R. 333 338
Deering v Lord Winchelsea, 1 Wh. & T. L. C. 89-95 .. 20

PAGE.

De Mattos v Saunders, L R. 7 C. P. 570 213
Denoon v Home & Colonial Ass. Co., L R. 7 C. P. 341 95
De Nicholls v Saunders, L R. 5 C. P. 593 21
Dennis v Loring Hard. 27 348
Dent v Auction Mart Co., L R. 2 Eq. 238, 14 L T. R. N. S. 827 128
Depeyster v Michael, 6 N. Y. 467 356
Desborough v Holmes, 1 F & F. 6 59
De Vitre v Betts, 21 W. R. 705 306
Dew v Clark, 1 Hagg. 11 321
De Witte v Palin, L R. 14 Eq. 251 217
Diamond v Gray, 5 C L. J. N. S. 95 29
Dickey v McCollough, 2 W & S. 83 356
Dietrich v Pennsylvania A. R. R. Co., 8 C. L. J. N. S. 202 79
Dingman v Austin 102
Dixon v Evans, L R. 5 H. L. 606 215
Dixon v Howiston, 16 L T. N. S. 295 59
Dixon v Muckleston, L R. 8 Ch. 155 325
Dixion v Yates, 5 B & Ad. 313 60
Doe v Bevan, 3 M & S. 353 348
Doe v Bliss, 4 Taunt. 735-6 345-356
Doe v Butcher, Douglass 51 and n ; 2 Prest. Conv. 195-197 351
Doe v Carter, 8 T. R. 57 348
Doe v Gladwin, 6 Q. B. 953 358
Doe v Jones, 5 Ex. ch. 498 358
Doe v Meakin, 1 East 459 158
Doe v Pritchard, 5 B & Ad, 689, 765, 781 354-358
Doe v Rees, 4 B & C 384 358
Doe v Salkeld Willis 676 348
Doe v Shewin, 3 Cambp. 134 358
Doe v Smith, (1847) 5 Taunt 795 358
Doe v Suckermore, 5 Ad. & El. 722, 747-8 .... 157, 342-3
Doe v Woodbridge, 9 B & C. 390 358
Dore v Gray, 2 T. R. 365 339
Dougherty v Matthews, 35 Mo. 520 356
Douglass, In re, L R. 7 Ch. 535 90
Douglass v Matting, 29 Iowa 498, 4 Am. R. 238 236
Dowling's Trusts, In re, L R. 14 Ex. 463 216
Dudgeon v Patrick, 1 Macq. H. Lds. 724 75
Dugdale v Dugdale, L R. 14 Eq. 234 216
Duke v G. W. R. Co., 14 U C. Q. B. 377 80
Dumper v Syms, Cro. Eliz. 315, 4 Co. 119, 120 .. 345-349
Dundas v The Hamilton & Milton Road Co., 13 Grant 311 166
Dunkley v Ferrers, 11 C. B. 457 25
Dunn v Birmingham Canal Co., L R. 8 Q. B. (Ex. Ch.) 42 ; s. c. L R. 7 Q. B. 244 ; 6 Am. Law Rev. 695 327
Dunn v McLean, Ch. Cham., The Referee 313
Durell v Pritchard, L R. 1 Ch. App. 244 128
Durie v Hopwood, 7 C B. N. S. 835 29
Dutton v Poole, 2 Lev 210., Vent. 318-322, approved by Lord Mansfield, Cowp. 443 17

E.

Eadon v Jeffcock, L R. 7 Ex. 379 219
Eagles v Le Breton, L R. 15 Eq. 143 327
Earl of Lisborne v Davies, L R. 1 C. P. 264 153
Earl of Bristol v Wellsmore, 1 B & C. 514 60
Eastern Counties R. W. v Brown, 6 W. H. & G. 314 146
Edwards v London & N. W. R. W. ; L R. 5 C. P. 445 171
Egerton v Brownlow, 18 Jur 100 343
Elliott v Queen City Ass. Co., Ch. Cham , Spragge, C. 159
Ellis v The Telegraph Co., 13 Allen 226 135
Englang v Cowley, L R. 8 Ex. 126 330
Erskine v Deans 166
Escott v Escott, C L. Cham., 1872.—Mr. Dalton 50
Espley v Wilkes, L R. 7 Ex. 298 93
Everett v Collins, 2 Comp. 505 60

PAGE.

European Bank, In re, Agra Bnk. Claim, L R. 8 Ch. 41 ... 300

F.

Far v Denn, 1 Burr 364 ... 158
Farewell v G. T. R. 15 C. P. 427 ... 80, 79
Fearon v Mitchell, L R. 7 Q. B. 690 ... 221
Feather v The Queen, B & S. 270-271 ... 156
Featherston v Wilkinson, L R. 8 Ex. 122 ... 302
Feaver v Montreal Telegraph Co., C. P. Easter Ter. 361
Feize v Wray, 3 East. 103 ... 60
Felkins v Hubbert, 12 W. R. 241 ... 7
Feltmakers' Company v Davis, 1 B & P. 98, & note A 3 B & P. 149 ... 17-18
Fenner v London & South Eastern Ry. Co., L R. 7 Q. B. 767 ... 220
Ferguson v Gibson, L R. 14 Eq. 379 ... 213-221
Ferguson v The Corporation of Galt, C P. H. T. ... 311
Finch v Throckmorton, Cro. Eliz. 221 ... 351
Fisher Ex parte, In re Ash. L R. 7 Ch. 636 ... 90
Fisher v Webster, L R. 14 Eq. 283 ... 216
Fiskin v Smith, 2 Ch. Cham. 401 ... 29
Fitzpatrick v Great W. Ry., 12 U C. Q. B. 465 ... 203
Flanders v Clark, 1 Ves. Sen. 10 ... 156
Fleming v Livingston, C L. Cham.—Gwynne, J. ... 191
Flemyng v Hector, 2 M & W. 172 ... 183-258
Fletcher v Krell ... 2
Fletcher v Smith, 13 Wend. 530 ... 357
Ford v Foster, L R. 7 Ch. 611 ... 97
Fordham v London, Brighton, & South Coast Ry., L R. 3 C. P. and 4 C. P. 619 Ex Cham. ... 368-79
Forsyth v Boston, &c., 103 Mass. 510 ... 208
Foster, Re, Ch. Cham., Blake, V. C. ... 313
Foster v Charles, 7 Bing. 105, Ir. L T. R. 191, note 5 59
Foster v McKinnon, 38 L J. R. N. S. C. P. 310 ... 235
Foulger v Steadman, L R. 8 Q. B. 65 ... 330
Fowler v Hollins, L R. 7 Q. B. (Ex Ch.) 616-635 .. 59, 62, 91
Fowler v Padgett, 7 T R. 509 ... 58
Fowler v Roe, 4 D & L. 639 ... 26
Fox v Swan, Styles, 483 ... 347
Fox v Whichcock, Bulst. 290 ... 350
Foy & his Wife v London B & S. C. R. W. Co. 18, C B. N. S. 225 ... 205
Fralick v Dormyn, C L. Cham.—Mr. Dalton ... 211
Franklin v South Eastern, R W. 3 H. N. 211 (Ex Ch.) 176
Fraser v Home Ins. Co., Ch. Cham., The Referee.... 191
Fraser v Rodney, 11 Gr. 426 ... 336
Fraser v Telegraph Co., L R. 7 Q. B. 566 ... 91
Frost v G T. R., 10 Allen 387 ... 209
Fullerton v Keeley, Ch. Cham., Jan. 20th, 1873.—Mr. Holmested ... 54
Fulton v G T. R. W., 17 U C. Q. B. 433 ... 148
Fussell v Dowding, L R. 14 Eq. 421 ... 221

G.

Garbutt, Re, G. Moore 157 ... 26
Gardner v Freemantle, 19 W R. 250 ... 184-259
Gardner, Re, 1 C. B. N. S. 215 ... 3
Garforth v Cairns, Ch. Cham., The Referee ... 212
Gamble v G W. R. Co., 24 U C. Q. B. 407 ... 82
Garnett v Albree, 103 Mass. 372-374 ... 355
Garnett v McKewan, L R. 8 Ex. 10 ... 300
Gaunt v Tynney, L R. 8 Ch. 8 ... 327
Gaunt v Fynney, 27 L T. N. S. 569, Nov. 4th, 1872.. 128
Gee v Metropolitan R W. Co., Ex. Ch., Weekly Notes No. 7, 1873 ... 204
General Provident Ass. Co., Ex parte National Bank, L R. 14 Eq. 507 ... 214
Geogegan, Re, 32 L T. R. 301 ... 25-26
George v Lawley, Skinner 302 ... 343

PAGE.

Giacometti v Prodgers, L R. 14 Eq. 253 ... 221
Gibbs v Lunabury, 22 Mich. 479 ... 286
Giles v Taff Vale R W., 2 E & B. 822 ... 171
Giles v Warren, L R. 2 P. & D. 401 ... 93
Gillard v Brittain, 8 M & W. 575 ... 59
Gilliard v Lancashire & Yorkshire R W., 12 L T. 356 157
Gilly v Copley, 3 Lev. 149 ... 18
Gleason v Gleason, 4 P R. 117 ... 39
Glengaber, L R. 3 Ad. & Ec. 534 ... 214
Glover v London & South Western R W. Co., L R. 3 Q. B. 35 ... 147
Goff v The Northern R W., 3 E & E. 672 ... 170-171
Goldsmith v Tunbridge Wells Commissioners, 14 L T. R. N. S. 154 L R. 1 Ch. App. 349 ... 128
Gompartz v Bartlett, 2 E & B. ... 849
Goodhue, Re, Ch. Cham., The Referee ... 192
Goodhue Will Case, 8 C J. N. Y. S. 38 ... 2
Goodtitle v Otway, 1 B & P. 586 ... 155
Gourley v Plimsoll, 28 L T. N. S. 598 ... 315
Graham, Re, L R. 2 P & D. 385 ... 97
Grant v Bridger, L R. 3 Eq. 352 ... 202
Grant v Grant, 34 Drew. 623 ... 143
Grant v Winchester, Ch. Cham., The Referee.... 160-193
Grantham v Powell, 1 P R. 256 ... 50
Gratitudine, The, 3 Chr. Rob. 269 ... 341-342
Gray v Leckham, L R. 7 Ch. 680 ... 222
Gray v Pearson, L R. 5 C P. 568 ... 18
Gray v The Queen, 11 Clarke & Finnelly 473 ... 342
Great Northern Ry. Co. v Shepherd, 8 Ex. 30-38.. 78-81
Great Western of Canada v Brand., 1 Moore P C. N. S. 101 ... 172
Great W Ry. Co. & Corporation of Township of Cayuga, Com. Pleas ; H. T., 1873 ... 188
Great Western Ry. v Blake, 7 H & N. 987 (Ex. Ch.). 209
Green v Baverstock, 14 C B. N. S. 204, 11 W R. C. L. Dig. 12 ... 300
Grier v Grier, L R. 5 H L. 688 ... 221
Griffin v Dighton, 5 Best & Smith 109 ... 341
Grimwood v Moss, L R. 7 C P. 360 ... 35, 93
Grodatre v Smith, L R. 1 P & D. 359 *Cur. adv. vult.* 132
Grote v Chester & Holyhead R W., 2 Ex. 251 ... 174
Groves v McArdle, Q. B. H. T. ... 309
Groves v McArdle, C L. Cham. ... 126

H.

Hadley v Clarke, 8 T R. 266 ... 251
Hall v Waterhouse, 11 Jur. N S. 361 ... 169
Halliday Ex. parte, In re Llebert, L R. 8 Ch. 283 300
Halpenny v Pennock, Q B. H. T. ... 309
Hamlyn v White, Ch. Cham., Strong V. C. ... 303
Hanover Ry. Co. v Coyle, 5 P F., Smith 390 ... 290
Harding v Harding, Ch. Cham., The Referee.. ... 313
Harding v Knowlson, 17 U C. Q. B. 504 ... 261
Harding, Re, L R. 2 P & D. 394 ... 93
Harold v G W. R. Co., 14 L T. N. S. 440 ... 207
Harrington v Wheeler, 4th Vesey Jr. p. 689 ... 31
Harris's Case, L R. 7 Ch. 587 ... 92-135
Harris v Nickerson, 21 W R. 635 L R. 8 Q. B. 286... 360
Harris v Scaramanga, L R. 7 C B. 80 ... 95
Harrison v Preston, Com. Pleas H. T., 1873 ... 188
Hartford v Power, Ir., L R. 3 Eq. 602 ... 143
Harvey v Mayne, 6 Ir. L T. R. 130 ... 59
Harvey v Walters, L R. 8 C P. 162 ... 302
Harvey v Wilde, L R. 14 Eq. 438 ... 217
Hassells v Simpson, 1 Dougl. 93, 4th ed. ... 339
Hastilow v Stobie, 35 L J. 577 P & M. L. R. 1 P & D 64 ... 132
Haswell v Hunt, 5 T R. 231 ... 60
Hatton, In re, L R. 7 Ch. 723 ... 213
Hawkins v Hoffman, C Hill. N. Y. Rep. 589 ... 81
Hawksworth v Morgan, Rowe R. 453 ... 250

PAGE.

Hawse v Crowe, R & M. 414..... 58-61
Hayes v Shier, Ch. Cham., The Referee..... 160
Hedges v Tagg, L R, 7 Ex. 283..... 97
Hellbutt v Hickson, L R. 7 C. P. 438..... 92
Helliwell v Hobson, 3 C B. N. S. 761..... 29
Hely v The Canada Company, Com. Pleas, H. T., 1873..... 189
Henderson et al. v White, Com. Pleas, H. T., 1873 189
Henwood v Harrison, L R. 7 C. P. 606..... 219
Herse v Dufaux, 21 W R. 313..... 138
Hesman v Pearse, L R. 7 Ch. 660, s. c. L R. 11 Eq. 522; 6 Am. Law Rev. 95..... 92
Hext v Gill, L R. 7 Ch. 699..... 219
Heymann v The Queen, L R. 8 Q. B. 102..... 325
Hicks v Newport, A. & H., R. W. 4 B & S. 403..... 176
Hicks v Ross, L R. 14 Eq. 141..... 90
Higginbotham v Hawkins, L R. 7 Ch. 676..... 94
Higgins v Harding, L R. 8 Q B. 7..... 326
Hill v Perrott, 3 Taunt. 274..... 59
Hill v Royds, L R. 8 Eq. 290..... 63
Hilliard v Cagle, 6 Tr. L T. 637..... 64
Hilton v Ankesson, Ex. 27 L T. N S. 519..... 64
Hilton v Hilton, L R. 14 Eq. 468..... 222
Hindley, vernery 13 L T R. N S. 372; Rep. 1 Eq. 52..... 128
Hirst v Denham, L R. 14 Eq. 542..... 222
Hitchcock v Fox, 1 Rolle. 48, 68, 70.....347-350
Hitchens v Congreve, 1 Sim. 500..... 313
Hoare v Brembridge, L R. 8 Ch. 22; L R. 14 Eq. 522..... 213, 326
Hoare v Cozenove, 16 East 398..... 157
Hodding v Sturchfield, 7 M. & G. 957..... 26
Hodgson v Loy, 7 T R. 440..... 60
Hodson v Drewey, 7 Dow. 769..... 26
Hoflick v Reynolds, 30 L J. Ch. 407; 9 W R. 431.. 52, 53
Holdich's Case, L R. 14 Eq. 72..... 94
Holker v Poritt, L R. 8 Ex. 107..... 329
Holland v Hodgson, L R. 7 C P. (Ex. Ch.) 328..... 94
Holt v Gaslight & Coke Co., L R. 7 Q B. 728..... 215
Hopkins v Westcott, 7 Am. L R. M S. 534..... 81
Hopkinson v Marquis of Exeter, 37 L J. Ch. 173; L R. 5 Eq. 63..... 185, 259
Horne v Midland R'y Co., L R. 7 C P. 583..... 215
Horne v Midland R'y Co., L R. 8 C P. (Ex. Ch.) 131; s. c. L R. 7 C P. 583; 7 Am. Law Rev. 471..... 301
Huddard v Rigly, 10 B. & S. 918..... 157
Hudson v Midland R. Co., L R. 4 Q B. 366..... 82
Hughes v Biddulph, 4 Russ. 190..... 359
Hugo v Williamson, L R. 14 Eq. 224..... 215
Humphrey v Wait, Com. Pleas, H T. 1873..... 188
Hunter v G. T. R. Co., C L. Cham.—Mr. Dalton.... 238
Huntsman v Great Western R. W., 20 U C. Q B. 24.. 147
Hutley v Hutley, L R. 8 Q B. 112..... 300
Hybart v Parker, 4 C B. N S. 209..... 18

I.

I'Anson v Stuart, (1 Sm. 1 C. 6th Ed. 67.)..... 317
Illinois Central R. W. Co. v Abell, 8 C L. J N S. 172. 80
Ill. Central Ry Co. v Slatton, 54 Ill. 133..... 207
Imperial Wine Co., Sheriff's Case, In re. L R. 14 Eq. 417..... 214
Indianapolis & Cincinnati R. W. v Rutherford, 4 U C. L J. N S. 242..... 204
Ingalls v Bell, 9 Metcalf, 15..... 175
Inman v Buffalo & L. H. R. W., 7 C P. 325..... 143
Imperial Land Company of Marseilles, Re The, 20 W R. 690..... 75
Iouides v Pacific Ins. Co., L R. 7 B B. (Ex. Ch.) 517; s. c. L R. 6 Q B. 674; 6 Am. Law Rev. 297..... 95
Ireland v Nichols, 46 N Y. 413..... 358

PAGE.

Irving v Mottey, 7 Bing. 543, 5 M & P. 393..... 58, 59
Isberg v Bowden, 1 C L R. 725 n..... 250

J.

Jackson v Allen, 3 Cow. 220..... 358
Jackson v Harriman Ch. Cham.—Mr. Taylor..... 29
Jackson v Kassell, 26 U C. Q B. 341..... 261
Jackson v Sheety, 18 Johns. 174..... 348
Jackson v Wood, 12 Johns. 73..... 45
Jeffrey's Trusts, In re, L R. 14 Eq. 136..... 90
Jenner v A'Becket, 25 L T R. N S. 464..... 234
Jewsbury v Mummery, L R. 8 C P. 56..... 325
John v Bacon, L R. 5 C P. 437..... 210
Joliffe, Ex parte..... 182
Jones v Bewick, L R. 5 C P. 32..... 317
Jones v Frost, In re, Fiddey (A Solicitor) L R. 7 Ch. 773..... 219
Jones v Lord Lieutenant..... 48
Jones v Neptune Marine Ins. Co., L R. 7 Q B. 702.. 217
Jones, Re, Deane & Swa. 3..... 132
Jones v Robinson, 1 Ex. 454..... 181
Jones v Roe, 3 T R, 96..... 155
Jordan v Fall River R. W., 5 Cushine 70..... 146
Joyce v Realm Ins. Co., L R. 7 Q B. 580..... 95
Judge of Perth v Robinson, In re, 12 U C. C P. 252. 262
Justices of York & Peel v Mason, 13 U C. C P. 159.. 263

K.

Keim v Yeagley, Master in Chancery, Jan. 4th, 1873—Mr. Taylor..... 55
Kemp v Halliday, 6 Best & Smith 737..... 340
Kendall v London & South Western Ry Co., L R. 7 Ex. 373..... 213
Kendrick v Smith, 7 W & S. 41..... 351
Kennedy v Stewart, 7 Ir. L R. 424 n..... 250
Kent v Riley, L R. 14 Eq. 190..... 98
Kettile v Bromsall, Willis 120..... 241, 243
Kettlewell v Barstow, L R. 7 Ch. 686..... 217
Kincaid v Kincaid, Ch. Cham.—The Referee, Strong V. C..... 212
King v Jarman, L R. 14 Eq. 357..... 222
King v Wildey, 1 M & S. 188..... 157
Kington v Nottle, 1 M & S. 363..... 156
Kingsford v Merry, 11 Ex. 577..... 58
Kingsford v Merry, 1 H & N. 503; 11 Ex. 577.... 62, 64
Kirk v The Guardians of the Bromley Union, 2 Phil. 640..... 22
Knight's Case, Cro. Eliz. 60..... 347
Knox v Gye, L R. 5 H L. 656..... 220
Knox v Gye, L R. 5 E & I. App. 656..... 239
Krause v Dorrance, 10 Barr 462..... 162
Kunber v Barber, L R. 8 Ch. 56..... 328

L.

Lafitte v Slatter, 6 Bing 623..... 61
Larchin v The North-western Deposit Bank, L R. 8 Ex. 80..... 302
Lariviere v Morgan, L R. 7 Ch. 550..... 94
Latch v Rimner R. W. Co., 27 L J. (Ex.) 155..... 211
Latter v White, L R. 5 H L. 578; s. c. L R. 6 Q B. (Ex. Ch.) 474; L R. 5 Q B. 622, 6 Am. Law Rep. 290..... 215
Lauder & Mulock, Re, Ch. Cham.—Strong V. C..... 160
Laughton v The Bishop of Sodor & Man..... 234
Laughtenborough v McLean, 14 C P. 175..... 20
Lauzeau v Leonard, 20 U C. Q B. 481..... 172
Laycock v Pickles, 4 B & S. 497..... 250
Lea v Whitaker L R. 8 C P. 70..... 302
Lechmere Charlton's Case, 2 Myl. & Cr. 316, 342.... 269
Le'Conteur v London & S. W. Ry, L R. 1 Q B. 54. 82, 145

PAGE.

Lee v Arnold, 4 Leon. 27, 28.....348, 355
Lee v Clarke, 2 East 340..... 126
Lee v Sankey, L R. 15 Eq. 204..... 330
Leeds v Crompton, Godb. 93, Decided 28, 29 Eliz.....346, 348
Levy v Wilson, C L Cham.—Mr. Dalton..... 191
Lewis & Wallace v Peck & Clarke, 10 Alabama R. 142..... 163
Lewis v Walter, 4 B & Ald. 614..... 178
Lincoln v Wright..... 121
Liverpool Marine Credit Co. v Wilson, L R. 7 Ch. 507..... 97
Lloyd v Collett, 4 Brown's C C. 459..... 36
Lloyd v Crispe, 5 Taunt. 249..... 352
Lloyd v Pughe, L R. 14 Eq. 241..... 217
Lloyd v Pughe, L R. 8 Ch. 88; s. c. L R. 14 Eq. 241; 7 Am. Law Rev. 475..... 325
Lockett's Case, Leach C C. 94, 6 T R. 567; 2 E P C. 940; 2 Russ. or Cr., 4th Ed. 640 N A..... 59
Locking v Parker, L R. 8 Ch. 30..... 327
London v Prov. Marine In. Co., 41 L J. N S. C P. 198. 155
Loomis v Eagle Life & Health Ins. Co., 6 Gray 399.. 157
Lord Holt in City of London v Wood, 12 Mod. 689.. 157
Lord Kildare v Fisher, 1 Strange, 71..... 157
Lord Southampton v Brown, 6 B & C. 718..... 18
Loughead v Knott, 15 Grant, 34..... 167, 202
Loughman v Berry, 5 Ir. L T R. 189..... 54, 58
Longmore v Great Western R W., 19 C B. N S. 183.. 208
Loughnan v. Barry & Byrne, C P. Ir. L T R. 186... 57
Ludlow v Drummond, 2 Taunt. 85..... 153
Lucas, Re, 29 U C. Q B. 92..... 142
Lyde v Russel, 1 B & Adol. 395..... 155
Lylds v Crompton, Cro. Eliz. 815; 1 Rolle, Abr. 472.....346-348
Lyle v Ellwood, L R. 15 Eq. 67..... 299
Lyle v Ellwood, 54 L T. (N S.) p 70..... 159
Lyman v Snarr, 3 P R. 86..... 50
Lynde v Hough, 27 Barb. 415..... 346, 357

M.

Macaulay v Phillips, Prac. Ct.—Wilson, J..... 237
Macher v Foundling Hospital, 1 Ves. & B. 188....352-358
Mack v Peter, L R. 14 Eq. 431..... 215
Mackay v Douglass, L R. 14 Eq. 106..... 97
Mackreth v Symmonds, 15 Ves. 354..... 158
Macrow v Great Western R. Co., L R. 6 Q B. 623.... 81
Mallory v Traveller's Ins. Co., 47 N Y. 52..... 286
Mandeville's Case, Co. Litt. 26 b..... 216
Mannox v Greener, L R. 14 Eq. 456..... 218
Marble v City of Worcester, 4 Gray 411..... 157
Marine Investment Co. v Haveside, L R. 5 H L. 624.. 222
Marks v Lahee, 6 L J. C P. 69..... 25
"Marpesia," The, L R. 4 P C. 212..... 91
Marshall v York, Newcastle, &c., R. W., 11 C B. 655..... 173
Martelli v Holloway, L R. 5 H L. 532..... 93
Martin v Great Northern R. W. Co., 16 C B. 179.... 208
Mason v Corder, 7 Taunt. 19..... 353
Masters v. Ibberson, 8 C B. 100..... 62
Mathews v Baxter, L R. 8 Ex. 133..... 301
Mayers v Langton, 17 Sol. Jour. 537..... 197
Mayhew v Suttle, 4 E & B. 347, 357..... 27
Mearns v G. T. R. Co., 6 U C. L J. 62..... 50
Meinertzagen v Walters, L R. 7 Ch. 670..... 90
Mercer v Graves, L R. 7 Q B. 499..... 97
Merchants' Bank v Tisdale, Ch. Cham.—The Referee..... 192
Merrick v Sherwood, 22 C P. 467..... 102
Merrifield v Cobleigh, 4 Cush. 178..... 355
Middlehurst v Johnson, 30 L J. 14..... 132
Miles v Furber, L R. 8 Q B. 77..... 302
Milliner's Estate, In re, L R. 14 Eq. 245..... 213
Milne v Marwood, 15 C B. 778..... 60
Milwood v Forbes, 4 Esp. 173..... 60
Minet v Morgan, 21 W R. 467; L R. 8 Ch. 361..... 359
Mitchell v Holmes, L R. 8 Ex 119..... 328
Mitchell v Reynolds, 10 Mod 138..... 156
Mitchell v Roberts, C L Cham.—Mr. Dalton..... 459
Mitchell v Weir, 19 Grant 568..... 170
Moffatt v Evans, C L Cham. Oct. 24, 1873—Mr. Dalton..... 50
Moffatt v Prentice, Ch. Cham.—Spragge, C..... 159
Mollero, March & Co. v The Court of Wards, L R. 4 P C. 419..... 220
Monsell v Armstrong, L R. 14 Eq. 423..... 220
Moore v Bushell, 27, L J. Ex. 3..... 62
Moore v Farrand, Leon 3..... 348
Moore v Metropolitan R. W., L R. 8 Q B. 36.... 149, 170
Mordaunt v Mordaunt, L R. 2 P & D. 120..... 158
Moreyr v Herrick, 6 Harris 128..... 298
Morgan v Parry, 17 C B. 334..... 28
Morgan v Rowlands, L R. 7 Q B. 493..... 95, 328
Mornington v Reene, 4 Jur. N. S. 982 n..... 251
Morrison v Universal M. Ins. Co., L R. 8 Ex. 40..... 326
Morritt v Douglass, 27 L T. N S. 591—Dec. 10, 1873. 131
Morse v James, Willes 127..... 342
Motion v Moojen, L R. 14 Eq. 204..... 90
Moufiet v Cole, L R. 8 Ex. (Ex. Ch.) 32; s. c. L R. 7 Ex. 70; 7 Am. Law Rev. 687..... 38, 301
Moutison v Jefferies..... 121
Mulcarry v Eyres, Cro. Car. 511..... 351
Mullarky & McAndrew v Laflamme, Re, Ch. Cham. —Blake, V. C..... 313
Munsie v McKniley, 15 U C. C P. 50..... 105
Munt v Glynes, 20 W R. 823..... 3
Munray v Clayton, L R. 7 Ch. 570..... 96
Murray v Metropolitan Dist. R. Co., 27 L T. N S. 762..... 203
Muschamp v Lancaster & Preston, J R W. 8 M & W. 421.....145, 209, 211
Mutton, Ex parte, In re Cole, L R. 14 Eq. 178..... 90
Mutual L. F. Ass. v Sudlow, 23 L J. 108 C P..... 127
Mytton v Midland R. Co., 4 H & N. 615..... 211

Mc.

McCallum v The Provincial Ins. Co., C L Cham.—Mr. Dalton..... 212
McCarty v The Metropolitan Board of Works, L R. 7 C P. 508..... 215
McCaulay v Furness, R W. L R. 8 Q B. 57..... 173, 327
McCue v James, 5 Ir. L T R. 89..... 25
McCulloch v Cowper, 5 W & S. 427..... 290
McDermott v Elliott, C L Cham.—Morrison, J..... 259
McDonald et ux, v Chicago & N. W. R. Co., 26 Iowa 124..... 208
McDonald v McEwan, C L Cham..... 126
McDowell v Berry, Ir. Law Rep. 399..... 261
McElroy v Nassau & Lowell R. W., 4 Cush. Mass. 400..... 210
McFarlan v Bolt, L R. 14 Eq. 380..... 220
McGillivray v McConikey, Ch. Cham.—The Referee, —Blake, V. C..... 161-161
McGiverin v James, 33 U C. Q B. 203..... 334
McGlynn v Moore, 25 Mo. 384..... 356
McGowan v Dyer, L R. 8 Q B. 141..... 328
McGregor v Boulton, 12 Gr. 293..... 336
McGuire v McGuire, C P. Easter Term..... 361
McIntyre v Eair, C L Ch.—Mr. Dalton..... 312

PAGE.

McKay v Harper, Ch. Cham.—Spragge, C..... 161
McKildoe v Darracott, 13 Gratt. 278..... 356
McLean v McKay, 21 W R. 798..... 279
McMurray v G. T. R., 3 Ch. Cham. 306..... 52
McPhadden v Bacon..... 226
McPherson v Daniels, 10 B & C. 275..... 178
McRay v Lockart, 4 O S. 407..... 143

N.

Nassau v McElroy, 9 Foster 1..... 210
Naylor, L R. 1 C C R. 4..... 59
Neal, et al, v Smith..... 75
Neave v Avery, 16 C B. 328, 3 C L R. 914..... 357
Nelson & McLennan v Wishart, Re, 14 Grant. 200... 199
Nepean v Doe, 2 M & W. 894..... 57
Newham v Stephenson, 10 C B. 728 H L..... 62
New Orleans Ry Co. v Strathaam, 42 Miss. 607..... 207
Newton v Newton, L R. 4 Ch. 145..... 21
Nicholson v Coulson, C L Cham.—Mr. Dalton..... 191
Nicholson v Lancaster & York R. W. 3 Hurl & C. 534..... 208
Nicholson v Peile, 2 Beav. 497..... 52, 53
Nickling v Heaps, 21 L T. N S. 754..... 59, 60
Noad v Noad, Ch. Cham.—Blake, V. C..... 160
Noble v Adams, 7 Taunt. 59, 2 March 370, Holt 251..... 58, 59
Nolan, Re, Ch. Cham.—The Referee and Chancellor. 313
North Amer. Ins. Co. v Burroughs, 28 Legal Intell. 342; s. c. 69 Pa. St. 43..... 285
North Penn. Ry Co. v Heilman, 13 Wright 60..... 299
Northwood v Keating, 18 Gr. 669..... 143

O.

Oaks v Turquand, L R. 2 H L. 325..... 62
Odger v Mortimer, 28 L T. N S. 472..... 296
Odger v Waterlco..... 317
O'Donell v Black, 19 Gr. 623..... 307
O'Donohue v Hembroff, Chan. Ch.—The Referee.. 312
O'Keef v Cullen..... 233
O'Malley v O'Malley, 12 Ir. L R. 112..... 178
Omichund v Barker, 1 Will 84..... 251
O'Neil v G. W. R. W. 7 C P. 207..... 143
Oppenheim v The White Lion Hotel Co. 40 L J. N S. C P. 232..... 155
Osborne v Gillet, L R 8 Ex. Ch. 88, 92, 96, 99, 327, 339, 343
Osborne v Moss, 7 Johns 164..... 159
Osborne v Wallerdon, 1 Mod. 273..... 157
Owenson v Morse, 7 T R. 64..... 60

P.

Pacaud v McEwan, P R. 1872—Galt, J..... 50
Pain, In re, v Town of Brantford—Assessment Cases.....
Pain v Malory, Cro. Eliz. 932 (43 Eliz)..... 355
Palmer v Evens, 1 C B. N S. 151..... 25
Palmer v Sir J. Edwards..... 274
Pappa v Rose L R. 7 C P. (Ex. Ch.) 529; s. c. L R. 7 C P. 32, 6 Am. Law Rev. 475..... 213
Parent v Murphy, (Strong v V. C., April 25, 1873).. 313
Parfitt v Chambre, Ex parte, D'Alteyrac, L R. 15 Eq. 26..... 328
Parker v Rensselaer & Saratoga R. W., 16 Barbour 315..... 210
Parmiter v Coupland..... 234
Parnell, In re, L R. 2 P & D. 379..... 94
Parry v Harbert, Dyer 45 b..... 347
Passmore v Western Union Tel. Co., U S R. Jan. 25, 1872, Hare J P..... 132
Patent Marine Inventions Co. v Chadborn. Notes of the Week..... 361
Patterson, Re..... 306

PAGE.

Paxton v Dryden, Ch. Cham.—The Referee..... 192
Peacock's Estate, In re, L R. 14 Eq. 236..... 213
Pearse v Pearse, 1 De G & Sm. 27..... 359
Pennant's Case, 3 Co. 64, 351
Pennell v Stephens, 7 C B. 987..... 26
Penniman v French, 17 Pick. 405..... 158
Pennsylvania Railroad Co. v Beale, U S R..... 296
Pennsylvania R. W. v Brooks, Am. Law Rev. 524. 177, 204
Penton v G. T. R. W.. 28 U C Q B. 367..... 144
Perkins v National Invest. Soc., 26 L J. Ex. 182.... 26
Perkins v Smith, 1 Wills 328..... 59
Peret v Wequelin L R. 7 C P. 355..... 156
Peterborough v Conger, I C C R. 35..... 142
Pickering v Stephenson, L R. 14 Eq. 322..... 214
Pigott v Thompson, 3 B & P. 147..... 18
Pitcher v Rawlins, L R. Ch. 259..... 21
Pittsburgh & Fort Wayne, C. R. W. Co. v Hinds, 7 Am. Law Rev. 14, 149..... 204
Phelps v London & N. W. R. Co., 19 C B. N S. 321. 82
Philadelphia & Reading R. W. v Derby, 14 Howard, U S R. 468..... 173
Phillips v Foxall, L R. 7 Q B. 666..... 94
Plant v Midland Ry Co., 21 L T. N S. 836..... 207
Playford v United Kingdom Electric Tel. Co. L R. 4 Q B. 706..... 362
Plews v Mutton, C L Cham.—Mr. Dalton..... 259
Plimsoll v Black, C L Cham..... 126
Plumer & Carey v Reed, 2 Wright 46..... 296
Pohill v Walter, 3 B & Ad. 114..... 60
Porter v Hildebrand, T. Harris Henn Rep. 129..... 81
Pollard v Rowland, 2 Blackburn (Ind.) R. 22..... 163
Poulton v London & S. W. R. W., L R. 2 Q. B. 534.. 171
Powell v Smith, L R. 14 Eq. 85..... 95
Powney v Blomberg, 8 Jur. 746..... 212
Praeger v Bristol & Exeter R. W. Co., 24 L T. N. S. 105; L R. 5 C. P. 460, No. 1..... 205-207
Preston v Dania, 21 W. R. 128; 27 L T. R. N. S. 612 ..... 40, 250, 135
Prestwitch v Poley, 18 C B. N. S. 806..... 25-26
Price v Easton, 4 B & Ad.. 433..... 18
Price v Helyar, 1 Moore & Payne 553..... 155
Prov. Life Ins. & Inv. Co. v Martin, 32 Maryland 310 285
Pryse v Pryse, L R. 15 Eq. 86..... 326
Pudsey Coal & Gas Co. v Corp. of Bradford, L R. 15 Eq. 167..... 326
Pym. v G N. R. Co., 4 B & S. 396-397 Ex. Ch. 406 175-176
Pyke, In re, an Insolvent N. S. R..... 314

R.

Reg. v Bathurst, 1 A. J. R. 40..... 59
Reg. v Dowey, 11 C C. C. 155..... 61
Reg. v Hughes, 1 F & F. 355..... 61
Rabidon v Harkin, 2 P R. 129..... 50
Radde v Norman, L R. 14 Eq. 348..... 222
Railroad Co. v Baddeley, 54 Ill. 19..... 207
Rainy v Bravo, L R. 4 P. C. 287..... 219
Rawson v Samuel, 1 Craig & Ph. 178..... 127
Rayner v Kochler, 27 L T R. N. S. 506, L R. 14 Eq. 217..... 262-291
Read v Great Eastern R W., L R. 3 Q. B. 555..... 175
Read v Hutchinson, 3 Camp 352..... 61
Reade v Livingston, 3 Johns. Ch. 491..... 155
Readhead v Midland R W., L R. 4 Q. B. 379 (Ex. Ch.) L R. 2 Q. B. 412; 17 W R. 789..... 174-178
Redman v Brownscombe, Ch. Cham., The Referee 161-192
Reed & Steel Ex parte..... 213
Reed v Tuttle, 35 Con. 25..... 352
Reeve, River Co. v Smith, L R. 4 E & Ir. App. 79... 59
Reeve v Wood, 5 B & S. 364..... 38
Reg. v Bird, 2 Denison C C. 149..... 342

PAGE.

Reg. v Castro, 28 L T. N. S. 222 ... 264
Reg. v Chapter of Exeter, 12 Ad. El. 531 ... 156
Reg. v Cornwall, 25 U C. Q. B. 286 ... 261
Reg. v Crown, 6 Mod. 67 ... 7
Reg. v Curgerwen, L R. 1 C. C. 3 ... 342
Reg. v Divisional J J. of Dublin, Ir. L T. Rep ... 32
Reg. Ex. rel. McGregor v Ker 7 U C. L. J. 67 ... 28
Reg. Ex. rel. Hannah v Paul, C L. Cham.—Mr. Dalton ... 238
Reg. Ex. rel. Lackford v Frizzell, C L. Cham., 1872.—Mr. Dalton ... 27
Reg. v Firman, C L. Cham.—Galt, J. ... 238
Reg. v Flannigan, Prac. Ct.—Wilson, J. ... 237
Reg. v Francis, Cunningham 286 3rd ed. ... 343
Reg. v Freere, 4 E & B. 598 ... 149
Reg. v Heaven, 2 T R. 776 ... 340
Reg. v Higgins, 2 East. 8 ... 343
Reg. v Inhabitants of Bothwell, 2 B & Ad. 639 ... 38
Reg. v Inhabitants of Stoke Bales, 6 Q B. 158-162 ... 262
Reg. v Jackson, 3 Comp. 370 ... 59
Reg. v Jenkins, 32 L J. N. S. M. C. 9 ... 33
Reg. v Justices Kent, 9 B & C. 283 ... 262
Reg. v Justices Suffolk, 1 B & Al. 640 ... 261
Reg. v Justices of Denbighshire, 1 B & Ad. 66 ... 33
Reg. v Justices of Middlesex, 2 B & Ad. 821 ... 198
Reg. v Lefroy, L R. 8 Q B. 134 ... 301
Reg. v Lock, L R. 2 C C. 10 ... 299
Reg. v Millis, 10 Clark & Finnelly 767 ... 155
Reg. v Newton, 24 L J. N. S. Q. B. 248 ... 155
Reg v Parker, 2 Mov. C C. 1, 8 C P. 331 ... 59
Reg. v Prince, 17 W R. 179 ... 61
Reg. v Reffit, Cunningham 62 3rd ed. ... 156
Reg. v Ritson, L R. 1 C C. 203-204 ... 339-341
Reg. v Roy, 11 L C. J. 93 ... 242
Reg. v Toole, Ir. R 2 C L. 40 ... 343
Reg. v Tucker, 3 B & C. 544 ... 262
Reg. v Walne, 11 C C. C. 647 ... 59-61
Reg. v Yeomans, C L. Cham.—Morrison, J. ... 237
Reid v Great Northern Ry., 28 L J. (Ex.) 3 ... 173
Reilly v Fitzgerald Drury, temp. Sugden 150 ... 153
Republic of Peru v Weguelin, L R. 7 C P. 355 ... 156
Reynell v Lewis, 15 M & W. 517 ... 184-258
Rhines v Evans, 16th.—P. F. Smith 192 ... 163
Richards v Chambers, 18 Ves. 580 ... 178
Richards v London & Brighton & South Coast R., 7 C B. 839 ... 82
Richardson v Metropolitan R. Co., L/R. 3 C P. 374 n. 79
Richmond v Proctor, 3 U C. L. J. 202 ... 50
Riddle v Hoffman's Ex'r, 3 Penn R. 224 ... 162
Ridge's Trusts, In re, L R. 7 Ch. 665 ... 95
Ripley v Railway Passengers' Ass. Co., U S. Ct. Mich. 738 ... 285
Roach v Garvin, 2 Atk. 470 ... 7
Roaf v Garden et al., C P. H. T. ... 311
Roberts v Geis, 2 Daly 538 ... 352
Robey & Co's Perseverance Ironworks v Olliver, L R. 7 Ch. 695 ... 219
Robinson v Dunmore, 2 B & P. 419 ... 82
Robinson v Shistel, C P., Easter Term ... 362
Robson v Dodds, 17 W R. 782 ... 7
Robson v Whittingham, L R. 1 Ch. app. 342, 13 L T. R. N. S. 730 ... 128
Roche et al. v Kempt, Q B. H. T.—Morrison, J., & Wilson, J. ... 309
Roche, Ex parte, L R. 6 Ch. ap. 795 ... 75
Roe v Birkenhead, Lancaster & C P. R. W., 7 W H. & G. 36 ... 146
Roe v Roper, Com. Pleas ... 188
Roe v Tranmer, 2 Wils. 78 ... 342
Rogers v Powell, 33 L J. N. S. ... 143

PAGE.

Roper v Johnston, L R. 8 C P. 167 ... 302
Ross v Fiedden, L R. 7 Q B. 661 ... 96
Ross v Grange, 27 U C. Q. B. 306 ... 50
R. C. Bank v Mitchell, 14 Grant 411 ... 170
Royal Canadian Bank v Stevenson, E & A ... 211
Rucker v Hiller, 3 Camp. 217 ... 61
Ruding's Settlement, L R 14 Eq. 266 ... 220
Russell's Policy Trusts, In re, L R 15 Eq. 26 ... 329
Russell v Russell, 1 Moll. 526 ... 251
Ryan v Devereux, 26 U C Q B. 100 ... 200
Ryan v Seymour A M & O. 181 ... 26

S.

S & M., Re, 3 C L J N S. 245 ... 23
Saltau v Dutteld, 2 Sim. N S. 133 ... 128
Sandercock v Reid.—McLarthy, Gar ... 104
Sanderson v Aston, L R. 3 Ex. 73 ... 329
San Roman, The, L R 3 Ad & Ec. 583 ... 214
Saville v Kilner, 26 L T R N S. 277 ... 128
Scechrists Appeal, 16 P F Smith, 237 ... 298
Schneider v Prov. Life Ins. Co, 24 Wis. 28 ... 286
Scothorn v South Staffordshire R W. 8 Eq. 341 ... 145
Scott v ——, 3 Dan & War. 388 ... 57
Scovell v Gardiner, 16 Ir. C L R. 347 ... 178
Secord v Great Western R W, 15 U C Q B. 631 ... 176
Semayne's Case, Ante. pp. 627-628 ... 359
Senior v Pawson, L R 3 Eq. 330 ... 264
Seymour v London & Provincial M. Ins. Co, 41 L J N S C P 198 ... 155
Sharon Iron Co. v City of Erie, 41 Pa. St. 341 ... 357
Shaw v G T R Co., 7 C P 493 ... 80
Shepherd v Bristol & Exeter, R W L R 3 Ex. 189 ... 143
Shepherd v Midland R W Co., 20 W R. 705 ... 298
Sheriff v Neal, 6 Watts 540 ... 298
Shier v Shier, 22 C P. 147 ... 337
Shinson v Hall, 1 H & N 331 ... 127
Siefke v Koch, 31 How. Pr. R. 333 ... 357
Simmonds v Swaine, 1 Taunton 549 ... 250
Simond, Re, 26 L J Ba. 49 ... 61
Simpson v Crippin, L R 8 Q B. 14 ... 301
Sinclair v Maritime Passengers' Ass. Co., 3 El. & E. 478 ... 296
Siner v G W R Co., L R 3 Ex. 150 ... 206-207
Singleton v Williamson, 31 L J 17 Ex ... 65
Skinner v London, B & S C R W. 5 Ex. 787 ... 173
Slater v Pinder, L R 7 Ex. 95 ... 75
Slingluff v Eckel, 14 Harris 472 ... 298
Smart, Ex parte, In re Richardson, L R 8 Ch. 220 ... 300
Smart v Welff, 3 T R. 348 ... 156
Smith v Adkins, L R. 14 Eq. 402 ... 220
Smith v Bank of New South Wales, The Staffordshire, L R 4 P C 194 ... 91
Smith v Cronk. Prac. Ct.—Wilson, J. ... 237
Smith v Darby, L R. 7 Q B. 716 ... 218
Smith v Fletcher, L R 7 Ex 305 ... 97
Smith v Great Eastern R W Co., L R. 2 C P. 4 ... 77
Smith v Hughes, 40 L J N S Q B. 225 ... 158
Smith, Montague, Justice, 18 L T Rep. N S 403, L Rep. 3 C P. 474 ... 23
Smith v Pulman, 3 Pick 221 ... 348
Smith v Smith ... 48
Smith v Smith, Ch. Cham.—Strong, V C ... 192
Smith v Thompson, C L Ch.—Mr. Dalton ... 312
Snowball, Ex parte, In re Douglas, L R 7 Ch. 535 ... 90
Sobey v Sobey, L R 15 Eq. 200 ... 327
Southcomb v The Bishop of Exeter, 6 Hare 213 ... 31
South of Ireland Colliery Co. v Waddle, L R 4 C P. 617 ... 23
Spencer v Harding, 19 W R 48 L R 5 C P. 561 ... 300

PAGE.

Sprague v Smith, 9 Verm. 421 ... 210
Spurr v Cass, L R 5 Q B. 656 ... 18
Stanton v Austin, L R 7 C P 651 ... 214
Stanton v Metropolitan R W Co., 4 U C L J. N S. 170 205
Stanton v Richardson, L R. 7, C P. 421 ... 91
State v Grand Trunk R W., 4 Am R. 258; 58 Me. 176 149
State v Overton, 4 Zabriskie 436 ... 79
Staunton v Weller ... 109
Stead v Hardaker, L R. 15 Eq. 175 ... 302
Stedman v Gooch, 1 Esp. 3 ... 61
Steele v Linebergers, Pittsburgh Legal Journal ... 2
Stephens v Australasian Ins. Co., L R. 8 C P. 18 ... 326
Stephens v Badcock, 3 B & Ad. 354 ... 26
Stephen's Trusts, Re, L R. 15 Eq. 110 ... 334
Stephens v Taprell, 2 Curt. 458 ... 201
Stephenson v Hart, 4 Bing. 476 ... 60
St. Helen's Smelting Co. v Tipping, 12 L T R. N S. 766; 11 H L Cass. 642, 650 ... 128
St. James' Club, Re, 2 D G M. & G. 383 ... 183, 258
Stock v McAvoy, L R. 15 Eq. 55 ... 299
Stratford v Baker, L R. 4 Eq. 256 ... 54
Stratford v Great Western Railway Co., Chan. Ch., The Referee ... 312
Street v Blay, 2 B & Ad. 456 ... 63
Stukely v Butler, Hobart. 168-170 ... 348
Swan, Ex parte, 7 C B N S. 440 ... 60
Swetnam v. Swetnam, Ch. Cham.—The Referee ... 161
Sylph, The, L R. 2 Ad. & Ec. 27 ... 178

T.

Talbot v Earl of Shrewsbury, L R. 14 Eq. 503 ... 217
Tally v G W R. Co., L R. 6 C P. 50 ... 82
Tanner v Scovell, 14 M & W. 37 ... 15
Tapner v Merlott, Willes 181 ... 340
Tarleton v Barnes, 2 Keen, 632 ... 52
Tarner v Walker, 14 W R. 793; L R. 2 Q B. 301 ... 360
Taylor v Campbell, Postmaster Gen., Q B. H T. ... 310
Taylor v Meade, 11 Jur. N S. 166 ... 169
Taylor v Taylor, 28 L T. N S. 189 ... 238
Tebutt v Bristol & Ex. Ry. Co., L R. 6 Q B. 73 ... 207
Teignmouth and General Mutual Shipping Ass., Martin's claim, L R. 14 Eq. 148 ... 98
Telegraph Co. v Dryburg, 35 Penna. 298 ... 133
Tenham v Nicholson, L R. 5 H L. 561 ... 219
Tenn. M & F S. Co. v Scott, 14 Mo. 46 ... 345, 356
Tharsis Sulphur Co. v Loftus, L R. 8 C P. 1 ... 299
Thatch v Great Western Ry., 4 U C C P. 563 ... 173
Thomas v Rhymney Ry. Co., L R. 6 O B. 266 (Ex.Ch.) 210
Thompson v Cohen, L R. 7 Q B. 527 ... 91
Threlfall v Borwick, L R. 7 Q B. 711 ... 219
Tichborne Case, L R. 7 Eq. 55 ... 7
Tichborne v Lushington ... 264
Tichborne v Mostyn, L R. 8 C P. 29; 26 L T. R. 554..264-308
Tinkham v Erie R R., 53 Barb. 393 ... 355
Tinkler v The Board of Works for Wandsworth Dis., 1 Gif. 412 ... 33
Tipping v Eckersley, 2 K & J. 264 ... 264
Tobin Cook, Re, v Tobin, Ch. Cham.—Blake, V C. ... 191
Todd v Emly, 8 M & W. 505 ... 184-258
Tomlins v Great Stanmore Nuisance Committee, 12 L T N S.; 113 Q B. ... 33
Toms v Township of Whitby, 32 Q B. (Ont.) 252 ... 38
Tonks v. Fisher, 2 Dowl. 22 ... 29
Torrance v. Boulton, L R. 14 Eq. 124 ... 98
Totten v. Douglass, 15 Gr. 128, 133 ... 337
Touteng v Hubbard, 3 B & P. 301 ... 158
Towser v Mashford, 20 L J. Ex. Ch. 226 ... 250
Travers v Travers, L R. 14 Eq. 285 ... 217
Treffz v Camelli, L R. 4 P C. 277 ... 91
Treward v Cailland, 6 T R. 441, 442 ... 156-159
Truslook v Robey, 11 Jur. 999 ... 251

PAGE.

Trumper v Trumper, L R. 14 Eq. 295 ... 214
Trust & Loan Co. v Start, Ch. Cham.—The Referee. 212
Trustees of the Port Rowan High School v Corporation of Walsingham, C P H T. 1873 ... 188
Tully v Chamberlain, Prac. Ct.—Morrison, J. ... 237
Turner v McAuley, 6 Ir. C L R. 245, 1856 ... 338
Turner et al. v Wilson, C P E T. ... 312
Tweddle v Atkinson, 1 B & S 393 ... 18
Twedell, In re, L R. 14 Eq. 536 ... 213

U.

United Merthyr Collieries Co., In re, L R. 15 Eq. 46 201

V.

Van Every v Drake, 3 P R. 84 ... 50
Van Rensselaer v Jewitt, 5 Denio. 121 ... 355
Varley v Coppard, L R. 7 C P. 505 ... 218
Vars v. The G T R. Co., P C. Easter Term ... 362
Venn v Cattell, 27 L T N S. 469 ... 29
Vernon v Vernon, 6 Chy. App. 338 ... 52, 53
Vincent v Going, 3 Ridg. P C. 599 ... 250
Vyse v Foster, L R. 8 Ch. 308, 309 ... 325-330

W.

Wain v Warlters, 5 East. 10 ... 250
Waite v Littlewood, L R. 8 Ch. 70 ... 326
Wakeham, In re, L R. 2 P & D. 295 ... 98
Walker v. Congreve, 1 Carpmael, 356 ... 156
Waller v Thomas, 42 How. 237, 337 ... 259-784
Wall's Case, L R. 15 Eq. 18 ... 327
Walsingham v Goouricke, 3 Hare 124 ... 359
Ward v Cartwright, 17 Jur. 781; 10 Ha. App. 73..52, 60
Ward, Ex parte, in re Couston, L R. 8 Ch. 144 ... 300
Ward's Trusts, In re, L R. 7 Ch. 727 ... 301
Warlow v Harrison, 7 W R. 133; 1 E & E. 295 ... 360
Warrior, The, L R. 3 Ad. & Ec. 553 ... 214
Waterous v Farran, Ch. Cham.—Mr. Dalton ... 159
Watkins v Western Assurance Co., 27 Sept. 1873 ... 313
Watson v Ambergate, N & B R W. 15 Jurist. 448 ... 145
Watson v Minchin, 1 Jones, 583 ... 61
Watson v Northern Ry. Co. of Can., 24 U C Q B. 98, 203
Watson v Poulson, 15 Jur. 1111 Rep. ... 60
Watson v Russell, 3 B & S. 425; 5 lb. 968 ... 61
Weatherall v Geering, 14 Ves. 511 ... 348
Webb v Sadler, L R. 14 Eq. 533 ... 221
Weeds v Saratoga R W., 19 Wards. 534 ... 211
Welfare v London & Brighton Ry. Co., L R. 4 Q B. 693 ... 77
Wells v Abrahams, L R. 7 Q B. 554; 41 L J Q B. 306; 26 L T N S. 433 ... 59-96
Wescott et al., Re, v Corp. of Peterborough, Q B H T. 310
Western Ins. Co., Re, Ch. Cham.—The Referee ... 192
Westerton v Liddell ... 120
Whately v Whately, 14 Grant, 430, 433 ... 167-433
Whitaker v Manchester & S R W., L R. 5 C P. 464 .. 205
Whitchcocke v Fox, 12-14 Fac. 1 Cannis, 1614-16 ... 350
Whichcot v Fox, Cro. Jac. 398 ... 350
White v Bayley, 10 C B N S. 227 ... 27
White v Garden, 10 C B. 919 ... 62
Whithorn v Thomas, 7 Man. & Grang. 4 ... 341
Whitney v Eaton, 15 Gray, 225 ... 347
Whitney v Snider, 2 Lans. 477 ... 236
Whyman v Gath, 17 Jur. 560 ... 250
Whyte v O'Brien, 1 S & S. 551 ... 127
Wigg v Nicholl, L R. 14 Eq. 92 ... 95
Wilkinson v Barber, L R. 14 Eq. 96 ... 95
Wilkinson v Belford ... 7
Wilkinson v Clements, L R. 8 Ch. 96 ... 301
Wilkinson v Griswold, 12 Smedes & Mor. R. 669 ... 163
Williams v Carwardine, 4 B & Ad. 621 ... 360

PAGE.

Williams v Davis, 2 Sim. 461 127
Williams v Everett, 14 East. 581..... 62
Williams, Re, 31 U C Q B. 153..... 306
Williamson v G T R., 17 U C C P. 515..... 147
Wilson v Gen. Mutual Ins. Co., 12 Cush. 265..... 155
Wilson v Northampton & B J R Co., L R. 14 Eq. 477. 220
Winsor v. Berry (24 Eliz.), Dyer, 45 b. n..... 348
Winters' Case, Dyer, 308;.....346, 348, 349
Wolferstan v The Bishop Lincoln, 2 Wills. 195..... 344
Wood v Finch, 2 F & F. 447.....184, 258
Woods v Devon, 13 Ill. 746..... 81
Woodward v Cumming, C L. Ch.—Mr. Bolton..... 312
Worth v Terrington, 13 M & W. 781, 795..... ... 342

PAGE.

Worthington v Boulton, C L. Cham.—Morrison, J.. 288
Wright v Garden, 28 U C Q B. 609..... 170
Wright v Midland Ry., Weekly Notes, 1873, No. 8.. 210
Wright v Wilkin, 2 B & S. 251, 242..... 168

Y.

Yates v Jack, 14 L T R. N S. 151; L R. 1 Ch. App. 295..... 128
Young v Power, 7 Ir. N S. 388; 9 L T N S. 176..... 62

Z.

Zealand v Dewhurst, C P Easter Term..... 302
Zung v South East Ry., R W L R. 4 Q B. 539..... 145

DIARY FOR JANUARY.

1. Wed.. *Circumcision.* Master and Registrar in Chancery and Clerks and Deputy Clerks of Crown to make returns. Taxes computed from this date.
5. SUN... *2nd Sunday after Christmas.*
6. Mon... *Epip.* Er. and Ap. sit. Co. Ct. T. begins. Heir and Div. sit. begins. Christmas Vac. in Chancery ends.
7. Tues... Last day for Tp., Vil. and Tn. Clks. to make Asst. returns to Co. Clerk.
8. Wed... Winter Assizes (York) beg. Meet. Ont. Leg.
9. Thurs.. Clks. Crown pay over fees to Prov. Tr.
10. Fri.... Last Day for Master and Reg. in Chancery and Clerks & Dep. Clk. C. to pay over fees.
11. Sat.... County Court Term ends.
12. SUN... *1st Sunday after Epiphany.*
15. Wed... Treas. and Cham. of Muns. to make ret. to Board of Audit.
18. Sat.... Candidates for Attorney to leave Articles, &c., with Sec. of Law Society.
19. SUN .. *2nd Sunday after Epiphany.*
20. Mun ... Coun. (Ex. C. Coun.) & Trus. Pol. Vil. hold first Meeting.
21. Tues .. Heir and Divisee Sittings end. Primary Examination of Articled Clerks & Students.
26. SUN .. *3rd Sunday after Epiphany.*
28. Tues .. First meeting of County Councils.
30. Thurs.. Last day for Non-Residents to make ret. of their lands to Clk of Mun. Candidates for call to pay fees and leave papers.
31. Fri.... Last day for Councils to make ret. to Gov.-Gen. Co. and City Clks. to make yearly ret. to Prov. Sec. Exam. for call to Bar. Law School Lectures begin.

CONTENTS.

EDITORIALS:
Notices to Subscribers 1
Curious Misprint 1
Corporal Punishment 1
Judicial Salaries 1
Goodhue Will Case 2
Law of Costs 2
Law Reform in England 2
Legal Additions, (curiosities of) 2
New Queen's Counsel 3
Chancery Appointments 3
The Law School 4
Contempt of Court 5
Law Students and Debating Societies 7
Resumé of Proceedings of Benchers last Term ... 10
Law Scholarships 11
Courts of Manitoba 21

SELECTIONS:
John William Smith. Sketches of his life 14
The Personal Character of Obligations 17
Corporate Seal—How far essential to a Contract .. 22
Concerning the Reading of Many Books 23
Liability of Attorneys for the Acts of Clerks 25

CANADA REPORTS:
Ontario:
Common Law Chambers:
Reg. ex. rel. Lachford v. Friszel—
Municipal Law—Property Qualification .. 27
In re. B. & S., Attorneys, &c.
Attorney and Client—Taxation 28
Chancery Chambers:
Jackson v. Harriman—
Changing Reference—Evidence of preponderating convenience necessary—Practice. 29

ENGLISH REPORTS:
Rolls Court:
Venn v. Cattell 29

IRISH REPORTS:
Queen's Bench:
The Queen v. The Divisional JJ. of Dublin.
Nuisance—18 & 19, *Vic. c.* 121, *Certiorari* 32

CORRESPONDENCE:
Professional Etiquette 34

REVIEWS:
British Quarterlies for October, 1872 35

THE
Canada Law Journal.

Toronto, January, 1873.

The Sheet Almanac for the year 1873 is mailed to subscribers with this number. We hope that it may be found as useful as ever.

Our readers will notice some alterations in the present number. We trust they will be found changes for the better. A circular to the profession gives further explanations on the subject. Desiring as we do to make the *Canada Law Journal* as useful as possible to our readers, we shall be glad to hear from them on subjects of general interest.

A curious misprint occurs in the columns of the *Chicago Law Times* set apart for advertisements of "New Law Books." There is advertised, a new American edition of the "Law of Vendors and Purchasers" by *E. B. Snyder* (Lord St. Leonards.) Evidently the Dutch *Snyder* is a more familiar name in that region than the English *Sugden.*

Corporal punishment is a most desirable penalty in a certain class of cases. A return to an address, recently published, but giving stale information, would show that the cat-o'-nine-tails has been used frequently, though we apprehend not at all too often, in this Province, but does not seem to meet with favor in the Provinces east of us. Probably cases of personal assault on women are not so common there.

Judge Ladd of the Supreme Court of New Hampshire has resigned, because the salary attached to the office is inadequate for his support. Judge Barnard, the

celebrated granter of injunctions, in the name of the people of the State of New York, "by the grace of God free and independent," having been disrobed and disbarred, has gone into the tobacco business, where he can more safely indulge his propensity of rendering a *quid pro quo*.

The Court of Appeal has given judgment in the *Goodhue Will Case* in favor of Mr. Becher's appeal from the order of the Court of Chancery. Our readers will remember that on 16th January, 1872, the judges were divided in opinion, (see 8 C. L. J. N. S. 38), and the case was consequently re-argued. The decision just given did not turn upon the power of the Legislature to pass the Act, but upon its construction. It is rumoured that an explanatory or amending act may be applied for this session by the petitioners for the former Act. But public opinion is strongly opposed to such objectionable legislation as this, and we have no fear that any such attempt will prove successful. The Premier at least is not likely to give it countenance, holding views opposed to the propriety of Legislative interference in this case.

In the Supreme Court of Pennsylvania Mr. Justice Agnew lately delivered the opinion of the Court upon a review of the old English statutes relating to costs which appear to be in force in that State to the effect that a judgment for the defendant upon an issue of *nul tiel record*, entitles the successful party to his costs. *Steele* v. *Linebergers: Pittsburgh Legal Journal, Dec.* At the close of his judgment he makes the following observations, which lose none of their point when read as if levelled at the state of practice in Ontario on the vital subject of costs:

"From the examination I have been under the necessity of giving to this case I have been led to the conclusion that an act of assembly to consolidate and simplify the whole law upon the subject of costs in different actions and legal proceedings is much needed, and if some gentleman of the bar, of sufficient practical experience, would prepare such an act for consideration and adoption by the Legislature, it would confer a great service on the profession, the courts and the public."

The Solicitor-General of England, Sir George Jessel, made the following remarks upon the question of law reform, in addressing his constituents at Dover:

To shew them that he really was in favor of law reform, he would tell them that he believed that the only law reform that could be effectual was the simplification of the usages not suited to the present age. As regarded the form of procedure, let them be able to transfer land cheaply and economically, which would be done by a proper Land Transfer Bill. The law of mortgage should be simplified; the law as to succession of land should be exactly the same as the succession of personal property. He would blot out the laws which prevented a woman after marriage enjoying the benefit of her landed property just as before, unless she chose to settle it on her husband or any one else. He would also alter the law of limitations."

We copy from the English *Law Journal*, which seems to regard Sir George Jessel as a true law reformer, in opposition to others whom it calls law revolutionists.

The complications of modern society are now occasioning no small trouble in legal circles, in view of the possible and actual *status* of the softer sex. Take the case of a woman fully divorced. What is her proper "addition" in law? Is it "spinster"? Take the still more puzzling case of a woman not fully divorced, who has only a decree *nisi* for the dissolution of her marriage. How is she to be styled? In the Nisi Prius case of *Fletcher* v. *Krell*, the point was raised as to the effect of the word "spinster," if used as descriptive of a woman in a contract. The defendant maintained that it was in effect a warranty of her condition, and that consequently the plaintiff, who had entered his employ-

ment as governess under the title of "spinster," when in fact she was a woman divorced from her husband, had commited a breach of warranty, and was not entitled to recover for her services.

So in *Munt* v. *Glynes*, 20 W. R. 823, the Master of the Rolls refers to the anomalous position in which a lady is placed by a decree for judicial separation: "She is at once divorced and not divorced; no longer a wife, and yet not an unmarried woman." The *Solicitor's Journal* dives into the old cases on the subject, and inclines to the conclusion "that a divorcee (this is nearly as bold a coinage as the famous Belleville term, "*seductee*") might be properly styled 'single woman,' which in strict technicality is applicable to an unmarried woman who is not a virgin." Among other notable things is pointed out that a woman's degree would not be sufficiently stated by styling her "wife of A. B.," unless her husband's mystery or estate were alleged (*Re Gardner*, 1 C. B. N. S. 215), but that the curious description, "spinster, otherwise wife of A. B." has been held sufficient: *Anon.* 3 N. P. C. 19; Dyer, 88, *a.*

On the 13th of December last, His Excellency the Governor-General was pleased to appoint the following Barristers-at-Law to be Her Majesty's Counsel learned in the law, in and for the Province of Ontario, viz: Daniel McMichael, D. C. L., of Toronto; Christopher Salmon Patterson, of Toronto; Edmund Burke Wood, of Brantford; and John T. Anderson and Thomas Moss, of Toronto. All these gentlemen had already received patents from the Lieutenant-Governor of Ontario.

On the 18th December the following gentlemen received a like distinction at the hands of the Governor-General:

Robert Stuart Woods, of Chatham; James A. Henderson, of Kingston; D'Arcy Boulton, of Toronto; Alexander Leith, of Toronto; Thomas Robertson, of Dundas; The Honorable John O'Connor, of Windsor; Hector Cameron, of Toronto; James Beaty, Junior, of Toronto; George A. Drew, of Elora; James Maclennan, of Toronto; David Tisdale, of Simcoe; Dalton McCarthy, of Barrie, and Hewitt Bernard, of Ottawa, Deputy of the Minister of Justice.

On the 26th December His Excellency appointed the following Barristers of Nova Scotia as Queen's Counsel for that Province, viz:

Alexander James, and James Thomson, of Halifax; The Honorable Henry Williams Smith, Attorney-General of Nova Scotia, of Liverpool; William Almon Johnstone, of Halifax; Hugh McDonald, of Antigonish; Joseph Norman Ritchie, of Halifax; Nathaniel Whitworth White, of Shelburne; Newton Le G. McKay, of Sidney, Cape Breton; the Honorable William Miller, of Halifax: and Alfred William Savary, of Digby.

CHANCERY APPOINTMENTS.

The loss of a valuable public servant is always a matter of regret. We felt this when Mr. Mowat left the Bench, though in that case the feeling was not unmixed with regret at the manner in which that retirement took place. We cannot, however, lose sight of the fact, that in Mr. Mowat the country has lost the services of a most able and learned Equity Judge, whose judgments have always been received with confidence by the Bar, and who devoted himself with untiring and patient industry to the very arduous duties of his high position.

Swiftly following on this resignation we have to notice that of Mr. J. A. Boyd, the Master in Ordinary of the Court of Chancery. During the comparatively short time that he held that office he exhibited in a marked manner the best qualities of

a Judge—ability, industry, and an eminently judicial mind. Conscientious and painstaking, his decisions gave general satisfaction. Admitted on all hands to be a sound lawyer, promotion would in his case seem to be only a question of time. We regret that his services are lost to the public in the important position which he has occupied.

Of Mr. Mowat's successor we have already spoken. Mr. Taylor, the Referee in Chambers, takes Mr. Boyd's place, and the vacancy caused by this promotion has been filled by the appointment Mr. George S. Holmested. We entirely approve of this principle of promotion where the public can thereby receive no detriment, and in this case we are confident that Mr. Taylor will well and diligently perform the duties of his office. It was said at one time that he took rather a technical view of cases before him in Chambers, but that is a thing of the past, and was mainly owing to a determined and a successful effort on his part to establish some regularity in a practice which was notoriously irregular and devoid of system. Mr. Taylor has a very good standing as a lawyer, and has had large experience in the business of the Court, and in questions of title under the Quieting Titles Act. The appointment of Mr. Holmested is a good one, as well as a popular one in the profession, and there will be every desire on the part of practitioners to give him every assistance, and make every allowance in matters of detail, where he may feel at a loss from a want of experience.

THE LAW SCHOOL.

The Law Society under the powers conferred upon them by an Act passed in the last Session of the Ontario Legislature have established a Law School, and appointed four Lecturers, one of whom is the President of the School, they have also decided on awarding as a special honor, to those who go through the School and pass the requisite examinations, exemption from service as students or articled clerks for periods of six, twelve and eighteen months.

The Barristers who have been appointed Lecturers, are Mr. Leith, Q. C., who is also the President of the School, and Messrs. Jas. Bethune, Z. A. Lash, and C. Moss. The several subjects of the Lectures are Real Property, General Jurisprudence, Commercial and Criminal Law, and Equity. We believe all these gentlemen to be thoroughly competent for the work allotted to them. But we cannot help expressing our regret that the Benchers did not continue the services of Mr. Anderson, Q. C., who has no superior in the profession in the knowledge of Commercial and Criminal Law, subjects in which he has been for so long a period Lecturer or Examiner for the Law Society.

It has always been a matter of great satisfaction to those who have been interested in the legal profession in Upper Canada, that so much attention has been given by the Law Society to the preparation of students both for the study and practice of the Law; and that in this Province alone of all the British Dominions, for a long series of years, was a compulsory examination required before call to the Bar. No one can doubt the beneficial effect of the system, and its adoption now by all the Inns of Court in England is abundant proof of the wisdom of its establishment by our Law Society nearly half a century ago.

The course in the Law School will be for six months, from November to May. There will be two classes, Junior and Senior, the first open to all clerks and students, the second open only to those, who have gone through the first, or have been two years engaged as clerks or students.

The course will consist of lectures, dis-

cussions on moot points, and examinations; and the examinations of every kind, except the primary, will be conducted in the Law School, in some cases in the presence of the Benchers, in other cases by the Lecturers alone.

We trust that we shall see a very large class of the young men, who are preparing for the profession, in attendance upon the School. The advantages to any sincere student of the laws are very great, not only in the direction of his studies, but in the practical benefit to be obtained by proficiency, in abridging his term of service. The two years that are gained now by an University degree, may be granted, less six months, under the rules adopted by the Law Society, and the time thus saved may be regarded as more than an equivalent for the expense that a student or clerk from the country may have to incur by his temporary residence in Toronto, whilst attending the School.

We hope that the School will be in every respect a success. We shall watch its progress with great interest, and be happy at any time to chronicle any of its proceedings that may appear to us to be of special importance to the profession.

We understand that the opening lecture will be delivered at Osgoode Hall, on Monday evening, the 3rd February, at 8 o'clock, by the Treasurer of the Law Society, the Hon. J. H. Cameron, to whom the profession is so largely indebted for his exertions in this and all other matters affecting their welfare.

CONTEMPT OF COURT.

A case has lately occurred in the State of Illinois, involving the power of the Supreme Court to punish the editors of a newspaper for constructive contempt, which has occasioned no small stir among the *corps editorial*. It is known as "The Journal Contempt Case," and arose upon an information by the Attorney General against the proprietor and the chief editor of the Chicago *Evening Journal*, based upon an editorial article which appeared in that paper. The article referred to the conduct of the Supreme Court in awarding a writ of *supersedeas* in the case of the murderer Rafferty, intimated that now-a-days money was all that was wanted to enable a man to purchase immunity from the consequences of any crime, and went on to state that "the Courts are now completely in the control of corrupt and mercenary shysters,—the jackals of the legal profession, who feast and fatten on human blood spilled by the hands of other men." At the date of the publication of this article a writ of error in the Rafferty case was pending and undetermined by the Court. It was held by four judges against three dissenting, that a writ of attachment should issue. The majority of the Court proceeded upon the rule as stated in various American cases referred to, that all acts *calculated* to impede, embarrass or obstruct the Court in the administration of justice, and any publications pending a suit reflecting upon the Court, &c., in reference to the suit, tending to influence the decision of the controversy, were to be considered as done in the presence of the Court, and therefore within the scope of the jurisdiction which Courts have, under the Revised Code, of punishing by attachment contempts offered by any person to them while sitting. One of the judges says:

"If the court is scandalized and its integrity impeached while a cause is pending before it: if the counsel are grossly libelled, and low and obscene terms are applied to them, which may have the effect to intimidate, the consequences must be the same as if direct contempts are offered. The administration of the law is embarrassed and impeded, the passions, often unconsciously, are roused, the rights of parties are endangered, and a calm and dispassionate discussion and investigation of causes are prevented."

The dissentient judges rested their opinion on the ground that the power to

commit for contempt should be limited to cases where the offence was committed in the actual presence of the judges.

One of the judges in the minority gives expression to opinions which have met with great popular and journalistic approval in the States. He says:

"I am not, however, unmindful that courts of the highest authority in this country and in England have assumed jurisdiction to punish in a summary manner, and on their own motion, what are termed constructive contempts, such an one as is sought to be set forth in the information filed. The exercise of this extraordinary power by a court of final jurisdiction has ever been regarded as of questionable authority, and one liable to great abuse, and which might become dangerous to the liberty of the citizen. The objection proceeds on the ground that the court ought to assume to be the best judge of the offence against itself, and of the mode and measure of redress where the law has provided, and where in the very nature of things there can be no mode of reviewing the action of the court in the premises. There has always existed jealousy against the exercise of arbitrary power by any tribunal supposed to be derived from common law sources, and not expressly granted by constitutions or the laws enacted by legislative assemblies. It must be conceded that public journals have the right to criticise freely the acts of all public officers, executive, legislative and judicial. It is a constitutional privilege that even the legislature cannot abridge. Such criticisms should always be just, and with a view to promote the public good. In case the conduct of any public officer is wilfully corrupt, no measure of condemnation can be too severe; but when the misconduct is simply an honest error of judgment, the condemnation ought to be mingled with charity. The public have a profound interest in the good name and fame of their courts, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the liberty of the citizen, is submitted to their final decision. The confidence of the public in the courts should not be wantonly impaired. It is all-important to the due and efficient administration of justice that the courts of last resort should in a full measure possess the entire confidence of the people whose laws they administer. All good citizens will admit that he who wilfully and wantonly assails the courts by groundless accusations, and thereby weakens the public confidence in them, commits a great wrong, not alone against the courts, but against the people of the commonwealth. But who shall furnish the remedy? Shall the court that is assailed or shall the legislative power of the State? In my judgment, there are many and politic reasons why the legislative power alone should provide the remedy, if any should be found to be necessary. It is far better that the judges of the courts should endure unjust criticism and even slanderous accusations, than to interpose of their own motion to redress the offence against themselves, where the offence complained of is not committed in their immediate presence. It is a matter of public history that it has been the policy of the press in this country to uphold and maintain the dignity of the courts. If a contrary policy should ever be inaugurated in the state to such an extent as to seriously affect the reputation or impair the efficiency of the courts in the administration of the law, I have no doubt that the Legislature can afford an appropriate remedy. It was said by this court in the case of Stuart *v.* The People, that "respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found on the judgment seat, so long and no longer will they retain the public confidence."

The *Chicago Legal News* (from which we take our report of the case) pronounces the whole proceeding "tyrannical and arbitrary, and contrary to the spirit of the Constitution," and it advocates the passing of an act by which the power of the State Courts to punish for contempt should be defined by statute, and their common law powers in that respect be abolished. This it appears is the position of the Supreme Court of the United States.

However republican license may be offended at the decision of the Court in the Journal Contempt Case, we think there is no reasonable doubt that it is in harmony with the spirit of the English decisions, though none are cited therein, and there is equally little doubt that the tenor of the whole article was a gross insult to the Court. When the power of the press is so much exalted as it is now-a-days, there is a tendency to make it, as "The

Fourth Estate," superior to the Courts of Justice. There is the ambitious desire to control, not only the public, but judicial opinion by the views of publicists, who not unfrequently rush to crude conclusions upon imperfect or one-sided information. A satirical suggestion for the amendment of the law was once made, that it be enacted that henceforth on trials for murder there shall be no judge, but the jury shall consist of upwards of five thousand volunteers who are not to be sworn, nor be allowed to see the prisoners or witnesses, nor hear the evidence, but shall be required to read every casual observation published on the subject, and write letters thereon to the newspapers. This is, after all, merely a somewhat exaggerated statement of the right which gentlemen of the press arrogate to themselves when they assume to control or regulate the course of judicial procedure. There may be cases where the Court can pass over in silence the impertinent observations of journalists upon pending suits, but there are other cases where the interference is so gross and insulting that the dignity of the Court requires to be vindicated. Of this kind was the slanderous article in the Journal Contempt Case.

Among analogous English precedents we may refer to the following, where the contempt to the court was rather constructive than actual, and consisted in acts and words of indignity spoken and done not in the presence of the Court. Many old cases are to be found in the books where contemptuous expressions and acts of the defendant, on being served with the process of the Court, have been punished by attachment: *Rex* v. *Crown*, 6 Mod, 67.

So in the "St. James' Chronicle Case," called *Roach* v. *Garvin*, 2 Atk. 470, the motion was to commit the printers of that journal for publishing a narrative of the facts of the cause, while yet pending, in the course of which they applied opprobrious epithets to some of the parties and witnesses. In *Charltore Case*, 2 M. & Cr. 316, the act of contempt was in writing a threatening letter to the Master of the Court of Chancery, to influence his decision in a matter then in progress before him. Contempt was also adjudged to have been committed in the *Tichborne Case*, L. R. 7, Eq. 55, by the printer of the *Pall Mall Gazette*, in publishing an article commenting on affidavits filed in a cause which was about to be brought before the Court. Among other late cases of a like kind we may just note the following: *Robson* v. *Dodds*, 17 W. R, 782; the *Cheltenham Waggon Company*, L. R. 8 Eq. 580; *Felkins* v. *Hubbert*, 12 W. R. 241, and the recent case in this Province of *Wilkinson* v. *Belford*, wherein the editor of the *Daily Telegraph* was held guilty of a contempt in publishing the bill of complaint with certain depreciatory comments.

LAW STUDENTS AND DEBATING SOCIETIES.

[COMMUNICATED.]

Heneage Finch, the "silver-tongued" Nottingham, used to advise the law-students of his day to read all the morning, and talk all the afternoon. Such advice would be lost on the Canadian student, for the way in which he shall spend his mornings and his afternoons, is not a matter upon which he can exercise much discretion. Acting in the many-sided capacity of apprentice to a solicitor, whose instruction is too often limited to an occasional reprimand, or in that of a paid clerk, a "small salary" being the one thing sought for—the routine of office-work must employ the best hours of his day. The student's reading must be accomplished in the hours he may snatch from the night, or, it may be, from the early morning. The student's talking, the exercise of speaking

in public, the discussion of questions of higher and more general importance, is too often discouraged, because, perhaps, it is thought that his training is such as to preclude him from knowing anything about questions of higher and more general importance; and too many in truth mistake their vocation, and had better be content with a less ambitious career, where their hands may be as much brought into play as their heads. To try and persuade some men in the profession that their students should exercise themselves in public discussion, and that a debating society is the proper place for such exercise, would be a hopeless task. They are apt to despise the cultivation of oratory as a weakness. They almost contemplate with horror a young lawyer with a taste for polite literature, and prophesy for him a melancholy future. They are prone to advise their young friends to depend entirely upon Practice Reports, and deeds of settlement, for intellectual refreshment. They remind one of the Fellow at Cambridge, who pictured to himself the seventh heaven as a region of pure mathematics.

But though there are some people of the class just alluded to, there are others with more liberal views; and, encouraged by them, the writer ventures to assert that Debating Societies offer the best, and, in truth, the only school, for that early practice in speaking, which is so essential to an advocate. Such societies tend to enlarge and freshen the minds of those whose daily pursuits have a tendency directly the reverse. They encourage and foster the three habits, which, according to the old saying of Bacon, should go to form a lawyer: the habit of reading, which makes a full man; of writing, which makes an accurate man; and of speaking, which makes a ready man. It is the habit of speaking, of course, in which the element of association is especially needful. Few men can become speakers by private exercise. In learning to speak, the student wants the extrinsic aid of an audience and an opponent. You may guide his attention to the best models of eloquence; you may impress upon him the necessity of diligent study of these models; you may assist him with many a hint. But he must teach himself to address numbers without hesitation; he must teach himself to think upon his legs; to detect in an instant the fallacy of an argument, and with equal readiness to expose it. A Cicero, or a Pitt may, after private study and observation, appear before the world as finished orators. Average mortals can only hope to become speakers after repeated efforts, and many failures in a public arena. "A Debating Society," says a Barrister, writing of an advocate's training, "is the only school for a beginner. An assembly of men met for the purpose of business, will not endure to be made the subject of a tyro's first steps in talking, and it would be an impertinence on his part so to use it. He must take his lessons for some time amongst those who meet with the same object, self-instruction; each enduring the others that he may he endured in turn. There he may venture to fail and dare to try again."

At a meeting lately held in Dublin of the Law Students' Debating Society, there were present the Lord Chancellor, and most of the prominent lawyers in Ireland. Mr. Butt, Q. C., proposed a resolution "that this Society deserves the support of the Benchers, the Bar and the Law Students," and spoke in eloquent terms of the aims, utility and success of the Society. The Lord Chancellor expressed his gratification at being present at the proceedings of a Society which, he believed, to be a most valuable adjunct to the education of young men intending to go to the Bar. He agreed with Mr. Butt that one great advantage of the So-

ciety, and of similar associations, was their instrumentality in bringing together in harmonious and friendly intercourse young men of different opinions and creeds, who in its relations, formed friendships which were destined, perhaps, to prove life-long. Genius and learning and zeal were sometimes thrown away, he said, from the simple want of the training and experience obtained in such arenas.

The greatest masters of eloquence have not disdained the practice of a debating club. Erskine, before he rose, unknown and friendless, from the back seats of the Queen's Bench, and delivered an oration which filled Westminster Hall with rapture, had constantly declaimed to an audience of Quakers and Shoemakers at Coachmaker's Hall. Burke prepared himself for Parliament in a Debating Club, and is said to have bestowed the same pains-taking care on the subjects there discussed, that afterwards characterized his speeches on India or America. Murray, Law, Wedderburn, Thurlow, Dunning, are instances of great lawyers and powerful orators, who in their younger days practised assiduously in a Debating Club. Lord Campbell, "plain John Campbell" then, used to harangue a Club at St. Andrews, of which the late Bishop Strachan was a member. Lord Brougham was a great believer in Debating Clubs, and used to urge law students to talk about everything. The argument from authority in favor of these Societies is a strong one.

But, it may be objected that the audience who listened to, and criticised the oratory of these great lawyers and their contemporaries, was a much more cultivated and critical one, than can be collected in a Canadian Club: the speaker will adapt himself to his hearers: an audience not highly educated will encourage a vapid and objectionable style of ratory. Granted that our students have not, as a rule, enjoyed the same liberal training as the young men who frequent the English University 'Unions,' or the London 'Forensic' Clubs; still, we believe them as a class to possess a very considerable degree of enlightenment. If, however, a consideration of this nature is to enter into the question, it will be extremely difficult to fix the exact period when Debating Societies, as an instrument of education, may be safely introduced into this country. But the truth is, a man need not be elaborately educated to justly estimate an orator. Nor does it require an extraordinary gift of native acuteness to distinguish between argument and mere assertion, between good taste and gaudy ornamentation, between sober sense and folly; and the audience which can discriminate between good and bad speaking, will applaud the former and ridicule the latter. Experience shows, that even if a man has not enough in him to discover and try to correct his faults, his audience will not be slow to discover and try to correct them for him. A Debating Club, and the writer ventures to maintain, a Canadian Debating Club, is not a place where a young man commences to talk nonsense, is encouraged to persevere in talking nonsense, and becomes irrevocably committed to talking nonsense all his days. It is a place where he may, and probably will, talk nonsense for a time. But it is just the place where he may, unless nature has been singularly unpropitious to him, advance beyond the initial stage of imbecility, instead of reserving that interesting transition for the Senate or the Courts of Law. Of course, success or failure rests with himself. The Society will not force him to be a speaker. It will only afford those opportunities, a conscientious use of which will be of immense benefit. But if he has the ambition to excel, with moderate parts, untiring industry, and a spirit not easily cast down by failure, he

may become, after diligent study and intrepid practice, not perhaps an *orator*, but a ready and effective *speaker*; a speaker who shall express his thoughts in a lucid, accurate, and collected style, so as to penetrate even to the understandings of juries at Nisi Prius, and fill the hearts of judges in Banc with unutterable gratitude.

LAW SOCIETY OF ONTARIO.

Michaelmas Term—36 Victoria.

The following is the *resumé* of the proceedings of the Benchers during last Term, published by authority :—

Monday, 18th November.

The resignation of George Palmer of his seat as a Bencher received and accepted.

The several gentlemen whose names are published in the usual lists were called to the Bar and admitted as Attorneys.

A call of the Benchers was ordered for last Friday of this Term, for the election of a Bencher in the place of Rolland Macdonald, Esq., who resigned last Term.

Tuesday, 19th November.

Examining Committee appointed for next Term, and report of Examining Committee for this year received and adopted.

Balance sheet and Auditor's report laid on the table. Report of Library Committee received and adopted.

A call of the Bench declined in the matter of S. J. Vankoughnet, Esq., but compensation ordered to be paid to him under the late statute, of $2,000, being one year's allowance according to former arrangement, if he declines the appointment of Reporter of the Court of Common Pleas, under the new arrangement.

Ordered that a grant of forty dollars be made to Mr. Joshua Rordans on the publication of a new edition of his Law List.

Thursday & Friday, November 21 & 22.

Intermediate Examinations.

Saturday, 23rd November.

The Treasurer reported result of Intermediate Examinations.

Letter from Mr. S. J. Vankoughnet, acknowledging receipt of resolution read.

Memorial from Mr. J. C. Cooper, assistant in Library read, and ordered that an additional allowance of one dollar per week be granted, together with a gratuity of twenty-five dollars for his efficient services.

Special case agreed to, if desired by Mr. S. J. Vankoughnet, before compensation resolution is acted on.

Committee on the rules, appointed in Michaelmas Term last revived and reconstructed.

Fifty dollars ordered to be paid to Mr. Evans as Examiner this Term.

Adjourned until Thursday next.

Thursday, 28th November.

Several gentlemen called to the Bar and passed Intermediate Examinations.

Friday, 29th November.

Scholarship Examinations held.

Fourth Year :

No Scholarships awarded.

Third Year :

Scholarship awarded to Mr. McMillan.

Second Year :

Scholarship awarded to Mr. Pepler.

First Year :

Scholarship awarded to Mr. McColl.

Saturday, 30th November.

The Treasurer reported result of Scholarship Examinations.

The following rules were adopted for examination of Articled Clerks:—

Notice to be given by a Bencher in one term for the next term, but notice for next February examination may be given by 1st January next.

Examinations by Examining Committee to be on same days as the examinations of Students.

A fee of one dollar to be paid to Secretary with notice.

A fee of forty dollars to be paid on presentation for examination, of which thirty dollars will be returned on failure to pass.

Time under articles to count only from time of passing.

Letter from S. J. Vankoughnet, Esq., accepting compensation and declining office of reporter read.

Mr. Proudfoot resigned his office of Examiner in Equity.

Mr. Rowsell ordered to be paid an additional sum of seventy-eight dollars per volume for printing the reports, on the recommendation of the Committee on Reporting.

The expense of entertaining the Governor General at Osgoode Hall ordered to be paid.

A call of the Benchers ordered for Saturday, 7th December, for election of Reporter of the Common Pleas, and of Lecturers.

Ordered that an exchange of the reports of the Courts be made with the Courts of Maryland.

Friday, 6th December.

J. A. Henderson, of Kingston, elected a Bencher in the place of Rolland Macdonald, Esq., resigned.

Rules for establishment of a Law School adopted.

Mr. Pardee was appointed a member of Reporting Committee in place of Mr. S. H. Blake.

Rule for meetings in vacation introduced and read a first time.

Saturday, 7th December.

Ordered that such cases in Practice Court and Chambers shall be published with the current reports, as the Committee on reports, or the Editor-in-chief may consider advisable.

Mr. George F. Harman was elected Reporter of the Common Pleas.

The following gentlemen were elected Lecturers: Mr. Alex. Leith, on Real Property; Mr. Jas. Bethune, on General Jurisprudence; Mr. Charles Moss, on Equity; Mr. Z. A. Lash, on Commercial and Criminal Law. Mr. Alex. Leith was appointed President of the Law School.

Messrs. Armour, Becher and Bell, were appointed a Committee to attend examinations for next Term.

The resignation of Mr. S. H. Blake as a Bencher, on his appointment as a Vice-Chancellor, received.

The Treasurer and Messrs. Crawford, Patton, Moss and Maclennan, were appointed a Special Committee to confer with the Attorney General in relation to the existing agreement between the Government and the Law Society, as to the accommodation of the Courts.

J. Hillyard Cameron,
Treasurer.

Osgoode Hall,
7th December, 1872,

LAW SCHOLARSHIPS.

The examinations for the Law Scholarships last term shew that there has been no lack of work on the part of the competitors. Mr. McColl especially distinguished himself, and passed one of the best examinations ever held at Osgoode Hall. No Scholarship was awarded for the Fourth year.

The other scholarships were awarded as follows.

Third year.

Scholarship awarded to	Marks.
Mr. McMillan,	292

Maximum number of marks, 370.

Second year.

Scholarship awarded to	Marks
Mr. Pepler,	265
Honorable mention,	
Mr. Cameron,	254
Mr. Creelman,	230
Mr. O'Leary,	224

Maximum number of marks, 320.

First year,

Scholarship awarded to	Marks.
Mr. McColl,...	303
Honorable mention,	
Mr. Ebbals,.....	265
Mr. McWhinnie,....	259

Maximum number of marks, 320.

COURTS OF MANITOBA.

The intimate relations which will, we hope, spring up between Ontario and Manitoba, will make the constitution of the courts of the latter province a matter of interest to us. An Act was recently passed by the legislature of Manitoba, assented to 21st February, 1872, which amended the Act establishing a Supreme Court, and changed its name to that of the "Court of Queen's Bench."

We give a copy of this Act in full, except as to certain formal matters of no interest to us. It is as follows:—

1. The Court of Justice established by the Act hereby amended, shall be styled the "Court of Queen's Bench" (or King's) instead of the "Supreme Court."

2. The Court shall consist of a Chief Justice, and two puisné judges, any one or more of whom shall form a quorum, and may exercise all the powers and jurisdiction of the Court, except when such shall sit as a Court of Error and Appeal, when two or more of them shall form a quorum, and the said Court, and the judges thereof, shall have, hold, and exercise an appellate, civil, and criminal jurisdiction, and also the jurisdiction of a Court of Error, with full power to take cognizance of, hear, try and determine in due course of law, all causes, matters, and things, appealed or removed by suit of Appeal or Error, from all Courts and jurisdictions wherefrom an Appeal or writ of Error by law lies or is allowed, and an Appeal shall lie to the said Court from all judgments rendered in the first instance by any one judge, and from all judgments rendered in the County Court as hereinafter provided.

3. In the absence of the Chief Justice, the Court shall be presided over by the senior justice, or in the case of two puisné justices being appointed on the same day, by the one first named in the notice of appointment in the *Canada Gazette*, published by authority at Ottawa.

4. Whenever, in the Act hereby amended, anything is authorised to be done by the Chief Justice, it shall be understood to mean, unless the sense be repugnant thereto, that the authority is given to the Court.

(1). [Grand and Petit Jurors' lists to be made up, and English and French jurors to be called alternately.]

5. So soon after this Act has come into operation, as a Chief Justice, or one or more puisné justice or justices shall have been appointed under this Act, a term of the Court of Queen's Bench shall be held, and not till then, and notice thereof shall be given by proclamation under the hand and seal of the Lieutenant-Governor, fixing the time and place of holding such Court; and no person shall be appointed under this Act as chief justice, or puisné justice, or as prothonotary of the Court, unless such person is able to speak both the English and French languages.

6. From and after the publication of such proclamation, so much of the Act hereby amended, as provides for the holding of Courts of Petty Sessions, shall be repealed, and the said Courts of Petty Sessions shall be abolished, and in place thereof there shall be held County Courts in and for each county of this Province, at some central place, to be fixed and appointed by the Lieutenant-Governor in Council.

7. A County Court shall be held in each County, six times in each year, on days and at places to be fixed by the Lieutenant-Governor in Council, in such manner as not to interfere with the sittings of the Court of Queen's Bench at Winnipeg, and so that Court shall not be held in more than one county at any one time.

8. Each County Court shall be presided over by the Chief Justice, or one of the justices of the Court of Queen's Bench.

9. The County Court shall have jurisdiction over all debts not exceeding one hundred dollars, Canada currency.

10. It shall also have jurisdiction of petty assaults and batteries, where the damages claimed do not exceed twenty-five dollars, Canada currency.

11. The jurisdiction shall be exercised in a summary manner, without jury.

12. No action shall be brought in the Court of Queen's Bench, for any matter in which the County Court has jurisdiction.

13. An appeal shall lie to the Court of Queen's Bench, from all judgments of the County Court, where the judgment amounts to forty dollars or upwards.

14. No appeal shall be allowed unless the appellant shall, within ten days after judgment, file with the prothonotary an appeal bond, with

two sufficient sureties conditioned to abide by and satisfy the judgment of the Court of Queen's Bench.

15. The Lieutenant-Governor in Council may appoint a clerk for each County Court, who shall issue all summonses and other process therein.

16. Such Clerk shall be *ex officio* Clerk of the Peace.

17. Until constables shall be appointed under the authority hereinafter conferred, the Lieutenant-Governor may appoint one or more constables to serve process, and discharge other the duties of constables in respect of such County Courts.

(1.) The High Sheriff of the Province may, from time to time, appoint bailiffs, and such bailiffs so appointed shall have power and authority to serve all writs issued from the Court of Queen's Bench or County Court, and to execute all orders of the said Courts directed to the sheriff, and the sheriff shall be responsible for the acts of the bailiffs appointed by him, as if they were his own acts, and the sheriff may, and is hereby fully authorized to take bonds from all bailiffs so appointed by him, and he may act in all matters appertaining to his office, personally or by deputy.

18. The fees of the clerk, constables, and other officers of such Court shall be regulated by the judges.

19. Parties may appear in the County Courts, and their causes may be pleaded either in person or by any duly admitted attorney and barrister of this Province.

20. The judge shall tax the costs of all judgments, and may include therein, as a fee for counsel employed in the cause, such sum as, in the opinion of the judge, is proportioned to the importance of the cause, and the necessity of professional assistance therein.

21. At the first meeting in each year of the County Court of any county, the court shall open as a Court of Sessions, and the justices and the grand jury of the county shall be required to attend thereat.

22 to 26—[Grand Juries.]

27. When the said Court shall sit as a Court of Sessions, the judge shall preside, and with the majority of the justices of the peace of the county, and the county grand jurors, shall transact the business in connection with the municipal affairs of the county.

28. The proper business of the County Court shall be proceeded with on such first term, after the municipal business shall have been completed, and the Court of Sessions shall have been adjourned.

29. [Appointment of Treasurer.]

30. The county grand jurors shall present any sums of money necessary, in their judgment, for any public purpose within the county, which, on being confirmed by the Court of Sessions, shall be binding on the county, and assessed and collected under the Act relating to County Assessments.

31. The grand jurors shall furnish to the Court the names of nine assessors for each county, of whom the Court shall select three, who shall be sworn into office before acting as such assessors.

32. The county grand jurors shall nominate three collectors of county rates for each electoral division of the county, of whom the Court shall appoint one for each division.

33. The county grand jurors shall present the names of three surveyors of highways, three pound-keepers, and three constables from each electoral division of the county, of whom the Court shall appoint one for each such division.

34. [In case of non-appointment of officers, Lieut.-Governor to appoint.]

35. The Lieutenant-Governor in Council may appoint, in each County of the Province, a suitable person or persons to take affidavits in any cause pending in the Queen's Bench or County Court, or to take affidavits to hold to bail, and to take recognizance of bail, or any other affidavit in any civil matter.

36. It shall be lawful for the Chief Jutices and the puisné judges of the Queen's Bench, or any one or more of them, to hold in or for the North-West Territories, any Court or Courts which may be created under the authority of the Governor-General, or of any Act of the Parliament of Canada and in or for such territories, or in respect of matters arising or transpiring therein, to discharge all such judicial functions as may be assigned to them or one or more of them by the Governor-General or the Parliament aforesaid.

37. The puisné judges of the Court of Queen's Bench [as amended by chapter 4], shall be *ex officio* Stipendiary Magistrates throughout the Province, and, with that view they shall make arrangements for the attendance, alternately, of one of their number at the police-station at Winnipeg, at such stated periods as the Lieutenant-Governor in Council shall from time to time prescribe, and shall take all examinations and hear all cases which can be taken or heard by or before a stipendiary justice, or any two or more justices of the peace.

SELECTIONS.

JOHN WILLIAM SMITH.

"I have done nothing worthy of being remembered for," said John William Smith to a friend, shortly before his death; but such has not been the verdict of those who have survived him, and who have known and appreciated his labours. Had he accomplished nothing else, his "Leading Cases" would have been a monument which would have perpetuated his name and memory when most of his contemporaries were forgotten. There is naturally a desire to know something of the men who have connected their names with, and impressed their thoughts upon the best of our legal literature. Among these, few deserve a higher rank than Mr. Smith. We have prepared the following brief sketch of his life in the belief that it will be found interesting to all, and in the hope that it will prove instructive to the young lawyer in teaching him to wait and prepare for *his opportunity* with modest patience and fortitude and indomitable industry and energy, and that other important lesson, so often forgotten, the necessity of *moderation* in the pursuit of the distinctions and emoluments of his profession. To memoirs by two of Mr. Smith's friends—one by Mr. Phillimore in the *Law Magazine* for February, 1746, and the other by Mr. Samuel Warren in *Blackwood* for February, 1867, we are indebted for most of the facts of this article.

John William Smith was born of Irish parents, in London, on the 23d of January, 1809. He displayed, even in his early years, a precocious intellectual development, not often to be highly valued, but which proved, in his case, an accurate indication of the great mental powers which he displayed in maturer years.

In 1826 he entered Trinity College, Dublin, where his whole career was one of easy triumph. In 1829, he gained a scholarship, and, the year following, the gold medal for classics, the highest honor in the gift of the college. So little, however, was he elated by this distinction, that it was not until some years afterward that, happening to be in Dublin, he called for and received his medal. Having determined to go to the bar, he was entered at the Inner Temple in 1827, though still pursuing his course at Trinity. The ease with which he got through his collegiate studies left him leisure for the acquisition of legal knowledge, and he procured a copy of Blackstone, and read it through several times with deep attention. Cruise's Digest, in seven volumes, octavo, he also read twice over, and Coke upon Littleton—an "uncouth, crabbed author," as Lord Mansfield said—he studied carefully. This would be a rather formidable course for leisure hours at college, but so rapidly and attentively did Mr. Smith read, and so tenaciously did his memory retain, that it was to him no difficult task. In 1830, he began keeping terms at the Inner Temple, and his appearance then was described by a fellow student as that of "a bashful, awkward person, dull and taciturn, with a formal, precise way of speaking, and a slight abruptness of manner." "His personal appearance was, it must be candidly owned, certainly insignificant and unprepossessing. He was of slight make, a trifle under the middle height; his hair was rather light, and his complexion pale. He wore spectacles, being excessively near-sighted, and had a very slight cast in his eyes, which were somewhat full and prominent. The expression of his features, at all events when in repose, was neither intellectual nor engaging, but they improved when he was animated or excited in conversation." Not a prepossessing picture, surely, but then it is only of the exterior, the physical. His mind proved to be as wonderful and beautiful as his body was plain and ungainly, and it did not take very long for the worthier of his fellow students to discover this.

In the same year he entered the chambers of Mr. Richard Blick, one of the most eminent special pleaders in the Temple, and after reading Tidd's Practice and Selwyn's Nisi Prius, concluded that "he had not a sufficient knowledge of pleading to get any benefit from the business which he saw." He therefore absented himself from chambers for a time, and after having read most thoroughly Chitty on Pleadings and Phillips on Evidence, returned to avail himself of the advantages offered by Mr. Blick's extensive practice. Here he laid the basis of an extended, profound and scientific knowledge of the law. With a wonderful memory, a clear, vigorous and disciplined

understanding and close application, he was, at the early age of twenty-two, a more thorough lawyer than most men ever are, and had become greatly skilled in that most difficult branch of English law—special pleading. After a year's pupilage, he left Mr. Blick and commenced his career as a special pleader. But admirably qualified as he was, he met with no success, having no connections and little tact to make them. Says Mr. Warren: "I question whether, during this two or three years' bitter, disheartening probation, he made more than thirty or at least forty guineas; his annual certificate for leave thus to do nothing cost him, nevertheless, $12." But though without business, he was not idle nor disheartened, but devoted himself to laying broader and deeper the foundations of a splendid legal knowledge. Warren and Phillimore, and others of his associates and friends, began a little weekly periodical called the "Legal Examiner," to which he was a constant contributor, "his papers being always characterized by point and precision though the style was dry and stiff." During this time, also, he prepared and published his treatise on "Mercantile Law," which, as soon as it became known, raised him to the very highest rank of legal writers. Though the production of an unknown youth of scarcely twenty-five, it was at once accepted as high authority, not only in England but in this country, and his opinions on controverted questions have often been received in the highest judicial quarters in preference to those of learned judges, as in the case of *Tanner* v *Scovell*, 14 M. & W. 37.

Finally, despairing of getting business as a pleader, he determined to try his fortune at the bar, and was called in 1834, selecting the Oxford circuit. But, notwithstanding some success at the sessions, he gained no foothold at the assizes, and at one time, seriously contemplated entering the Church. He had a fondness for theological studies and was said to be remarkably well read in them.

In 1835 Mr. Warren published his "Introduction to Law Studies," in which was urged upon the student, the necessity of mastering a few "leading cases" as *nuclei* of future legal acquisitions. Mr. Smith at once seized upon this suggestion and conceived the idea of preparing a book under the name of "Selection of Leading Cases." There was no work of the kind, and much learning and judgment were requisite to accomplish it successfully. He began about the middle of 1835, and published the first volume in March, 1837. The great value of the book, and the consummate ability and skill with which it had been prepared, were at once acknowledged on every side. Mr. Warren says: "Almost all the judges and the most eminent members of the bar, wrote to him in terms of warm respect and approbation." And even from this side of the Atlantic did he receive high commendation, for Mr. Justice Story wrote him: "I consider your work among the most valuable additions to judicial literature which have appeared for many years. The 'Notes' are excellent, and set forth the leading principles of the various cases in the most satisfactory form, with an accuracy and nicety of discrimination equally honorable to you and our common profession. I know not, indeed, if any work can be found which more perfectly accomplishes the purpose of the authors."

The demand for the work was so great that he at once set to work on the second volume, and succeeded by great energy and industry in bringing out the first part of it by May, 1838, although his time was partly occupied by his duties as Common Law lecturer to the Law Institute, a position which he had accepted in November, 1837. He now met with considerable annoyance and some delay from a firm of law booksellers, the publishers of his "Mercantile Law," and to whom he had offered his "Leading Cases." Mortified at the success of a work which they had refused, they took measures to restrain its sale on the ground that the author had been guilty of piracy in selecting some few cases from "Reports," published by them, as texts for his masterly legal discussions. Mr. Smith and his publisher contested the matter with triumphant success, both before the Vice-Chancellor and Lord Chancellor.

Of the "Leading Cases" it is not necessary to speak. They are known wherever the common law of England is known and studied. They have had many imitators, especially in this country, of late years, but they stand immeasurably superior to any of their followers. Six large editions of them have been published here, and the seventh will shortly appear.

As a law lecturer, Mr. Smith won great distinction. "He had a great talent," says one of his biographers, "for communicating elementary information; and even the most ignorant and stolid of his listeners could scarcely avoid understanding his simple and lucid explanations of legal principles." One series of his lectures on "Contracts" was published after his death, and though never designed nor prepared for publication, they may be justly regarded as models of a lucid and concise exposition of the subject.

His "Leading Cases" was, however, the key that opened the gate to fortune, and business began to come to him. The leaders of the Oxford circuit took every occasion to name him as arbitrator when the more important cases at the assizes were agreed to be so disposed of, and he invariably gave the highest satisfaction to both parties. Shortly, he made his way to a large and important junior business on circuit, and "few cases of great importance were tried in which Mr. Smith was not early engaged, and the entire conduct of the cause, up to the hour of trial, confidently intrusted to his masterly management." Mr. Warren pronounced him, without exception, one of the ablest *pleaders* that he ever came in contact with. He seldom used precedents (often observing that "no man who understood his business needed them, except in very special occasions"); but he seldom erred even in merely formal matters, while he was quick to detect any inaccuracy on the part of his opponent. Of his manner in court Mr. Warren says: "When he rose to speak his manner was formal and solemn, even to a degree of eccentricity, calculated to provoke a smile from the hearers. His voice was rather loud and hard, his features were inflexible, his utterance was exceedingly deliberate, and his language precise and elaborate. His motions were very slight, and, such as he had, ungraceful; for he would stand with his right arm a little raised and his hand hanging down passively by his side for a long time together, except when a slight verbal motion appeared—he the while unconscious of the indication—to show that he was uttering what he considered very material." But his great ambition was to have a first-class pleading business, and so rapidly was it gratified that in 1843 he was compelled to resign his lectureship at the Law Institute.

His success was, however, his destruction, for his unflagging devotion to business undermined a constitution never very vigorous, and consumption set in.

During the last three or four years of his life he was rarely in bed before two and sometimes three, and even four o'clock, having, nevertheless, to be at Westminster or Guildhall by half-past nine or ten in the morning.

In 1844 his physician pronounced his disease incurable, and that his death was only a matter of months, but he never flagged in his attention to business. In 1845 he went to the spring circuit, being retained in some of the heaviest causes. In July he appeared for the last time in the court of Exchequer, and he remarked to a friend, afterward, "The judges must have thought me talking great nonsense; I was so weak that it was with very great difficulty I could keep from dropping down, for my legs trembled under me all the time violently, and now and then I seemed to lose sight of the judges." Yet, there was no failing of the mind, and his argument on the occasion was "distinguished by his usual accuracy, clearness and force of reasoning." A couple of months later—weaker and near the end—he said, "I have none to thank but myself; I have killed myself by going the last circuit, but I could not resist some tempting briefs which awaited me." But even then he *would* work, though unable to sit up; and he worked over his briefs, cases and pleadings with an attention and devotion that could have come from nothing but love for the labor. Even on the morning of his death when, as he said, he heard "strange human voices speaking to him intelligibly," he dictated "not only an appropriate, but a correct and able opinion on a case of considerable difficulty." But the wasted lamp could not longer hold out to burn, and on the 17th of December, 1845, in the thirty-seventh year of his age, John William Smith died. It was his desire to be buried in the little burying ground of the Temple Church, but the Benchers, though anxious to fulfil his wish, could not comply, and he was interred at Kensal Green. A little stone at the head of the grave gives his name, age and profession, and the day of his death. A more pretentious tablet of white marble,

containing an appropriate inscription, written by his friend Mr. Phillimore, stands in the Triforium of the Temple.—*Albany Law Journal.*

THE PERSONAL CHARACTER OF OBLIGATIONS.

CONTRACT: EFFECTS ON THIRD PERSONS.

The original and simplest form of contract is that which is made between certain persons, and the effects of which are strictly confined to those persons or their representatives.* It is still the most frequent, and may be taken as the general type. In such a case the persons who actually negotiate the contract are the same who are bound by the consequent obligation; moreover they appear as individual persons acting each in his individual capacity, and not as members of a class answering to a general description.† Assuming this as the rule, we have two conceivable kinds of departure from it.

1. Where the persons who act in concluding the contract do not coincide with the ultimate parties to it: that is, where immediate rights or duties are created in persons not parties to the transaction.

2. Where the parties are not completely ascertained at the time of making the contract: that is, when there is a contract.

(*a.*) Either with any person indefinitely who shall satisfy a certain condition or answer a certain description.

(*b.*) Or with the person who for the time being shall satisfy some condition or possess some attribute which may continue to subsist in a succession of different persons.

All these variations from the normal type of contract are treated as exceptional, and cannot be introduced except with certain limitations, and in certain classes of cases. This will appear by taking in order the several branches of the rule and the exceptions which are recognised.

1. There is no doubt that in general a contract cannot be made to confer rights or impose duties on a person not a party to it. As to duties, it is clear on principle that individuals cannot be allowed at will to subject others without their assent to personal liabilities.* It is not so immediately obvious why it should not be competent for them to confer rights on third parties; and, in fact, the law was for a considerable time far from completely settled on this head. It was held sometimes that any third person for whose personal benefit such a contract was made might sue upon it;† sometimes that near relationship at all events was a ground of exception;‡ though the weight of authority seems to have been on the whole in favor of the view which ultimately prevailed.§

But (to use the words of a judgment which finally overruled the older authorities relied on for the supposed class of exceptions in favor of near relationship) "it is now established that no stranger to the consideration can take advantage of a contract although made for his benefit;" so that if one person makes a promise to another for the benefit of a third, that third person may not maintain an action upon it, even if the parties expressly

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* *I.e.*, those who succeed to their legal existence as representing them by force of some general operation of law, independent of the particular transaction.

† Savigny, "Obligationenrecht," sec. 53, vol. 2, p. 16. The general principles being identical, I follow Savigny's arrangement, and several paragraphs are in effect free translations from him.

* It is true that in quasi-contracts (which we still persist in calling by the cumbrous name of contracts implied in law) the one party may be placed by acts of the other of which he is at the time wholly ignorant in a position analogous, but only analogous, to that of one who has entered into an actual agreement.

† Dictum of Buller, J., 1 B. & P., 101 *n.* "If one person makes a promise to another for the benefit of a third, that third may maintain an action upon it."

‡ *Dutton* v. *Poole*, 2 Lev. 210, Vent. 318, 322, approved by Lord Mansfield, Cowp. 443, is the type of these anomalous cases. It was not decided without much difference of opinion at the time.

§ *See* Evans, Appx. 4 to Poth. Obl., a short but very well considered essay; judgment of Eyre C. J., in *Company of Feltmakers* v. *Davis*, 1 B. & P., 98, who inclined to think B might sue on a promise made to A for his, B's, benefit by laying the promise as made to himself and giving in evidence the promise actually made to A.; and note *a*, 3 B. & P., 149: the older authorities are collected in Vin. Ab. 1, 333-7, Assumpsit Z; two or three of these are cases of agency, which (as will presently be observed) is no real exception.

agree that he may.* And it was laid down by the Court of Chancery many years earlier to the same effect, that "when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not the right to enforce the covenant against the two, although each one might as against the other.† On the other hand, it does not appear that an arrangement made between the contracting parties for their own convenience has ever been allowed to give a right of action to a person not a party; the person suing must show a promise made immediately to himself.‡ But as regards contracts under seal, the rule of the common law has always been clear and inflexible (even where simple contracts admit,§ or have been supposed to admit,‖ of exceptions), that on a deed made between parties no stranger can have an action, or join in any action for non-performance of covenants contained in it.¶ "Those parties only can sue or be sued upon an indenture who are named or described in it as parties."

The principle has been carried out consistently and even rigorously in modern times. An agreement for hiring the tolls of certain fen lands at a rent "to be paid to the treasurer of the commissioners," gave no right to the treasurer to sue for payment of the rent, for the contract was with the commissioners only, independent of the further objection that the true meaning of the agreement was to secure payment to the treasurer *for the time being*, which it was admitted would be bad as an attempt to contract with an uncertain person.* In an action on a by-law of a company imposing a fine to be paid to the master and wardens for the use of the master wardens and company, the right to sue was determined to be in the master and wardens only.† And an agreement by co-adventurers amongst themselves that the amount of calls due from any one of them shall be considered as a debt due to an officer of the partnership, who shall have power to sue for it, is in violation of the law, and gives no right of action to such officer.‡

On the whole then the rule is firmly established; and there is good ground in reason for it. The obligation of contracts is a limitation imposed on what

* *Tweddle* v. *Atkinson*, 1 B. & S., 393,

† *Colyear* v. *Mulgrave*, 2 Keen, at p. 98. The right of the parties themselves is perhaps over-cautiously expressed. It was in truth but an instance of the "elementary principle that will not enter into an inquiry as to the adequacy of the consideration" (per Byles J., 5 C.B., N.S., 265): it is presumed that the party who wants a thing done finds some benefit in it (8 A. & E., 743), and there need not be any apparent benefit at all. The doctrine is not new: cp. Ro. Abr. 1, 593, pl. 7, Y.B. 17 E, 4, 5; if I promise to pay vi *s.* a week for the commons of another "la ley intend que il est un tiel per que service jeo aie avantage." In other words, that which a man has with his eyes open chosen to treat as valuable is conclusively taken as against him to be of the value he has put upon it. But this belongs to the general doctrine of consideration.

‡ *Price* v. *Easton*, 4 B. & Ad., 433.

§ *Beckham* v. *Drake*, 9 M. & W., at p. 95, per Parke B.; 1 Wms. Saund., p. 477.

‖ *Gilly* v. *Copley*, 3 Lev. 140, on a demurrer: as to the end of the cause itself the reporter adds: "I suppose the parties agreed, for I never heard more on't."

¶ *Lord Southampton* v. *Brown*, 6 B. & C., 718.

* *Pigott* v. *Thompson*, 3 B. & P., 147.

† *Company of Feltmakers* v. *Davis*, 1 B. & P., 98. In a case the converse of this, there being a joint contract by several persons for a payment to be made to one of them, the Court of Exchequer inclined to think "the action ought to have been by all upon the promise made to all, though only one was to receive the money:" *Chanter* v. *Leese*, 4 M. & W., 295; but no judgment on that point. *Jones* v. *Robinson* (1. Ex. 454), is rather the other way: that case was in effect as follows:—the purchaser of a business from two partners promised them in consideration of the assignment of the partnership effects to him to pay the debts of the partnership; one of the late partners who had himself advanced money to the partnership was not repaid, and thereupon sued the purchaser on the promise made to both partners; and it was held well.

[But the decision is not easy to understand. For—

1. It seems hardly doubtful on principle that both the late partners must have joined as plaintiffs, if the partnership debt the defendant refused to pay had been due to a stranger.

2. The circumstance of the suing partner himself having been the creditor ought to have made no difference, for there was no separate promise to pay him in his capacity of creditor. How far this did in fact influence the judgment is not clear.]

Spurr v. *Cass*, L.R., 5 Q.B., 656, goes on the ground of Agency, and is, therefore, not decisive on this point.

‡ *Hybart* v. *Parker*, 4 C.B., N.S., 209; Cp., *Gray* v. *Pearson*, L.R., 5 C. P., 568.

would be in its absence the lawful freedom of action of the party bound by it, and the law will not enforce such limitations beyond what is required to carry on men's ordinary affairs: now, it cannot be said that for this purpose it is generally necessary† to give the parties to a contract the power of conferring rights on third persons.

Exceptions.—The exceptions real or apparent to this rule are now to be shortly considered.

1. The most obvious is Agency. A contract made by an agent within his authority, or even made without authority and subsequently ratified, is binding on the principal: and this at first sight looks like an exception to the rule confining the legal effect of contracts to the actual parties. But the exception is only apparent, for the true party is the principal, and the agent is only the instrument by which the intention of the principal is expressed.

There are several conceivable degrees of agency according to the relative importance to the agent's part in the transaction; but the same principle runs through all.

If I discuss with another party an offer made by him, and we come to no final agreement, but afterwards I send a messenger to signify my assent, the messenger has only to deliver that, and is not concerned to know the matter to which my assent relates; he is just as much a passive instrument as a letter would be.

Nor does it make any difference in the nature of his instrumentality if the terms of the message are so full and explicit that he understands what it is about, but still has no choice. Again, if I empower him to exercise a strictly limited discretion (as to propose giving a certain pr and increase it up to a certain limit if necessary) it is impossible to treat this as a substantial distinction. Again, if we go yet a step farther and consider what happens when I employ the agent not merely to act, but to judge, and leave the choice of several courses to his discretion, it still appears that he is in the same situation touching the ultimate contract as the mere messenger. For though it is in his discretion to determine against several possible alternatives that one which is to constitute the intention on my part to be declared in the final contract, yet the intention is mine when determined. I may tell him to buy these or those goods for me according to the best of his judgment, but it is I who am the real buyer of the goods he decides upon.

In short, it matters not for this purpose whether the agent is the bearer of only one certain resolve of the principal, or of several alternative resolves amongst which he is to choose.*

The case is somewhat less simple when the agent contracts nominally for himself, but really for an undisclosed principal. But here the rule of law still rests upon the ground, "that the act of the agent was the act of the principal, and the subscription of the agent the subscription of the principal."† The principal has effectually and truly contracted, and "the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another."‡ Accordingly, if any agent makes a contract in his own name, the principal may sue and be sued on it,"§ except in the case of contracts under seal, when a technical doctrine, applicable to deeds only, prevents this.‖ And the fact of the agent expressly signing his own name makes no difference in this respect.¶ The peculiarity is that the introduction of the principal as a party is possible only, not necessary. In fact, there are two alternative and mutually exclusive** obligations, the principal being a party in one, the agent in the other. "Whenever an express contract is made, an action is maintainable upon it either in the name of the person with whom it was actually made or in the name of the person with whom in point of law it is made,"†† and

† Savigny, Obl. 2, 76; D. 44, de O. et A. 11 45, 1, de v. o. 38, sec. 17. Inventæ sunt enim hujosmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur nihil interest mea.

* Savigny, Obl., sec. 57 (2,157-59); Cp. *ib.* sec 51 (2,19).

† Per Parke B., *Beecham Drake*, 9 M. & W., 96.

‡ *Ib.* p. 91, per Lord Abinger C. B.

§ *Cothay* v. *Fennell*, 10 B. & C., 671.

‖ *Beckham* v. *Drake*, 9 M. &. W., 95.

¶ *Ib.* 91.

** Leake on Cont., 300, 304.

†† *Cothay* v. *Fennell*, 20 B. & C., 6.

by the other contracting party against either of them.* The alternative character of the obligation is made clearer by considering the case of a contract made with an agent in the agent's name, the principal also being made known: then the other contracting party has still a right to sue the agent or the principal at his election.† As for the analogous cases where parties not named in a transaction conducted by some of their number, are nevertheless treated as parties to it, "all questions between partners are no more than illustrations of the same questions as between principal and agent."‡

The legal aspect of the matter is the same when the principal's authority is given by subsequent ratification, and this whether the other party at the time of making the contract knows that he is dealing with an agent or not.§

2. There is another class of apparent exceptions when contractual relations exist between two persons, and one of them acquires new rights by the dealings of the other with a third person; and in the case of principal and surety.‖ But these new rights, though immediately acquired in consequence of a transaction to which the party acquiring them is no party, are really incidental to the prior contract to which he was a party, and may therefore be properly referred to it; so that the case is analogous to a conditional contract depending on a collateral event, the difference being that here the condition is annexed to the contract, not by the will of the parties but by judicial rules.

Generally speaking,¶ A and B may make a contract conditional on any collateral event; and they may choose for that purpose the event of a certain transaction taking place between C and D, or between A and B, as well as any other; and this may or may not be connected with the principal matter of the contract. Then the mutual rights of A and B under their contract depend on and are to be determined by a transaction between different parties; but their foundation is not in that transaction, but in the agreement of the parties themselves. But the creation or modification of the rights arising out of a contract may be annexed to a collateral event by the law as well as by the agreement of the parties, and will still be no less referable to the original contract. However the event invested with such consequences by the law will naturally be something affecting the matter of the principal agreement, and thus a confusion may arise at first sight which cannot present itself in the simpler case above stated.

3. Again, the powers of a majority of creditors in bankruptcy proceedings and compositions to bind the rest may be considered as forming an exception to the rule in question.* But it is to be observed that such proceedings are really not so much independent transactions as steps in a judicial process, or an arrangement carried out by machinery made capable by special legislation of taking its place, the ultimate result of which, as of every litigation carried out to its end, is a complete transformation of the previously existing rights on which the process was founded.

4. There exists, however, a real and important exception in the case of trustees. The equitable obligations of a trustee are partly in the nature of contract, partly analogous to the class of obligations known in the common law as duties founded on contract: and he may become bound by these to persons, who not only are not parties to the contract from which their rights are derived, but are not and cannot be in existence when it is entered into, and whom, indeed, it often taxes the utmost ingenuity of judicial interpretation to ascertain.

It is not usual either in practice or in books† to regard the relations of trustee and *cestui que trust* in this light; nor perhaps is there very much to be gained

* The limitations to which this is subject are not material for the present purpose.

† *Calder* v. *Dobell*, L. R., 6 C. P. 486.

‡ *Beckham* v. *Drake*, 9 M. & W., 98, *per* Parke B.

§ *Bird* v. *Brown*, 4 Ex. 798.

‖ Pothier, Obl. s. 89, who treats this as a real exception. The doctrine as to co-sureties rests on the general principle of *quasi*-contract: 1 Wms. Saund., 267 f. (The equitable principle of *Dering* v. *Lord Winchelsea*, 1 Wh. & T., L.C. 89, 95, is differently expressed but in substance the same, and therefore gives rise to no difficulty here.)

¶ *I.e.*, subject to the restraints imposed by public policy, which need not be now considered.

* Pothier, Obl., sec. 88.

† Mr. Story in his work on Contracts has a chapter on Trustees, but gives no explanation of the ground on which it is inserted, nor does he discuss this aspect of the matter.

by it in considering the equitable jurisdiction apart from the general body of law, since Equity has developed a terminology for its own peculiar purposes which has attained a very creditable amount of definition, at least taking into the account the difficulties it had to contend with in starting from random talk about conscience. But if we want to be in a position to compare accurately the operations of Common Law and of Equity (which it may before long become necessary to do), it is important to have a clear view of the bearing of general legal * ideas on the special institutions of Equity.

We are accustomed to speak of equitable estates, interests, and ownership. But it must not be forgotten that the analogy consists only in the practical result to the beneficiary. He obtains through the medium of his trustee advantages of the same kind as are incident to actual ownership and other real rights: but his actual rights are not merely subject to a different jurisdiction, but of a different nature. Speaking broadly, equitable ownership is in truth a personal obligatory relation between the trustee and the beneficiary. Without discussing this in detail, it may be observed that the doctrine, now more fully established than ever, of purchase for valuable consideration without notice being "an absolute, unqualified, unanswerable defence"† in equity is alone sufficient to show that this point of view is the right one. For when a right, good against all the world, such as legal ownership, is in question, the existence of notice may indeed be a ground of interference against the person affected with it, but the absence of notice is, in itself, immaterial, and cannot, save in certain exceptional cases, produce any positive advantage.‡

The converse doctrine as to the effect of giving or omitting to give notice to the trustee on assignments of equitable interests are also important in this point of view. Comparing the position of the original debtor on an equitable assignment of a debt with that of the trustee on an assignment of an equitable interest, it is easy to see that the essential character of the two transactions is the same. The trustee is in the same relation to his apparent *cestui que trust*, as a debtor to his apparent creditor or a lessee to his apparent reversioner. It falls under the "rule of general jurisprudence not confined to choses in action . . . that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation:"* and all the distinctions as to the circumstances under which priority is or is not gained by notice are or ought to be matters of deduction from this rule. The other class of cases as to equitable assignments, which rests on the principle that a man cannot assign any interest except such as he has,† do not really interfere with its generality. The rights of a purchaser of an equitable interest are of course equally personal, being derived from the original personal obligation between the trustee and the beneficiary, and it is only as "the implied agent of the *cestui que trust*,"‡ that he has any recognizable interest before the novation is complete.

It is hardly necessary to observe that the personal character of the whole law of trusts is grounded not merely in theory, but in the historical origin of the institution; and that, while subject to some qualifications in its wider bearings, it is still carried out to various collateral consequences with an inflexible logic sometimes involving no small hardship.

* One must either use the adjective *legal* in two senses, viz., sometimes (as here) corresponding to law in general, sometimes to Common Law as opposed to Equity, or have recourse to the cumbrous term *juristic*, which I think ought not to be introduced into English if ambiguity can by any other possible means be avoided.

† Per James L. J., in *Pilcher* v. *Rawlins*, L.R. 7 Ch. 269, where an attempt to give a new artificial development to the doctrine of constructive notice is completely disposed of.

‡ The equitable obligation towards the *cestui que trust* of other persons deriving title from the trustee with notice, must be considered as quasi-contractual. Of course those rights must be distinguished which are truly real rights as between themselves at all events though not generally recognised by the common law: such are the rights arising from equitable liens and equitable encumbrances created by the owner of the legal estate.—See, *e. g. Newton* v. *Newton*, L.R., 4 Ch., 145.

* Per Willes J., in *DeNicholls* v. *Saunders* L.R., 5 C.P., 593.

† Lewin on trusts, pp. 496-7 (5th ed).

‡ Lewin, 501.

It would be a matter of some interest, and probably also of some difficulty, to determine the true character of the relation between persons claiming adversely to one another as *cestuis que trust* under the same disposition; but this does not fall within the scope of the present discussion.—*Law Magazine.*

CORPORATE SEAL—HOW FAR ESSENTIAL TO A CONTRACT.

The recent case of *Crampton* v. *The Verna Railway Company*, decided by Lord Hatherley (L. Rep. 7 Ch. App. 562), in affirmance of the Master of the Rolls, furnishes an unpleasant illustration of the difficulties, or, perhaps, we might say, the absolute denial of justice which may result from the rule that a corporation can contract only under its common seal. Notwithstanding the numerous and important exceptions which have been established, the rule is still a rule, though in many cases it will be found very difficult to determine the line at which the rule ends and the exceptions begin. In *Crampton* v. *The Verna Railway Company*, the agent of the company which was constructing a railway in Turkey, agreed verbally with the contractors, through whom the plaintiff claimed, that if the plaintiff would build on the company's land certain cottages, in a substantial manner, and leave them for the use of the company, the company would pay them 5000*l.* The cottages having been accordingly built, the agent of the company agreed with the contractors that they should be paid 500*l.* annually, by way of rent, and that the company should have an option to purchase for 5000*l.* The agreement was confirmed by a resolution from the board of directors, and the company paid the 500*l.* a year for some years, and then refused to make any further payment. The court holding that the claim of the plaintiff was only a money demand, also held that the fact of the agreement not being under seal, constituted no ground for the interference of a court of equity to compel performance of the contract, and a demurrer for want of equity was consequently allowed.

This decision was fully in accordance with that of Lord Cottenham in *Kirk* v. *The Guardians of the Bromley Union* (2 Phil. 640), and there can, we think, be little doubt that the plaintiff's remedy, *if any*, was either at law under the contract, or in equity to the extent, and only to the extent of the benefit conferred. The remarks of Lord Hatherley, in the conclusion of his judgment, are interesting, as indicating the consequences which, in his Lordship's opinion, result from the absence of the corporate seal. He says:—"The truth is, that every one who deals with corporations like these, must be taken to know what are their powers of contracting, and must take a contract accordingly; and when there is only a money demand, and there is no valid contract, then this court cannot interfere in the matter. I certainly was impressed with the consideration of the length to which these doctrines might be carried; but I think the arm of the court is always strong enough to deal properly with such cases. There might be a contract without seal, under which the whole railway was made, and of which the company would reap the profit, and yet it might be said that they were not liable to pay for the making of the line. When any such case comes to be considered, I think there will be two ways of meeting it. It may be (and perhaps is so in this case) that the contractor has his remedy against the individual with whom he entered into the contract, although he may have no remedy against the company; or it may be that the court, acting on well recognised principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment. But the matter in question here is collateral to the main object of the company, and is not essential to the existence of the railway for which the company was incorporated; and in that respect this case differs from the case I have supposed, and does not call for the interference of the court. I think the position of the plaintiff is very unfortunate; but subject to that remedy he may have at law against the persons who entered into the engagement with him, it appears to me that he is left without remedy."

In regard to the remedy suggested by proceeding against the agent of the company, it is difficult to see in what way an agent acting *bonâ fide* and professedly as such, and making no false representations of any matter of fact, could by possibility

be held liable for the contract being held invalid for want of a seal. The very recent case of *Beattie* v. *Lord Ebury* (Notes of the Week, Aug. 10, 1872), before the Lords Justices of Appeal, is entirely opposed to any such notion. The case suggested by Lord Hatherley, of a contract without seal under which an entire railway was made, we think would be almost certainly within the principle of the *South of Ireland Colliery Company* v. *Waddle* (L. Rep. 4 C. P. 617), where Lord Chief Justice Cockburn, in delivering the judgment of the Court of Exchequer Chamber, spoke of the old rule "as a relic of barbarous antiquity," and refused to re-introduce it by disregarding a long series of decisions in which it had been held not to apply to corporations or companies constituted for the purpose of trading, and where the contract was necessary for the purpose of such corporations or companies.

So in the court below (18 L. T. Rep. N. S. 403; L. Rep. 3 C. P. 474), Mr. Justice Montague Smith, says:—"The modern doctrine, as I understand it, is, that a company which is established for the purpose of trading may make all such contracts as are of ordinary occurrence in that trade, without the formality of a seal, and that the seal is required only in matters of unusual and extraordinary character, which are not likely to arise in the ordinary course of business." It would thus appear probable that in the case put by Lord Hatherley, the contractor would have an adequate remedy at law, and on that ground would be precluded from resorting to equity.

Assuming, however, that from the special constitution of the defendant company, or from the general law, the plaintiff is without legal remedy, it appears to us that he is not entirely without an equitable remedy—not indeed on the contract, but under the head of equity, stated in paragraph 22 of Mr. Shelford's book on Joint-Stock Companies, second edition, viz, :—"That companies which have derived benefits from dealings on their behalf, beyond their powers, or on which they cannot be sued at law, or for some other reason, are liable in equity to recoup the persons from whom they have derived such benefits, to the extent they have benefited;"—a proposition amply supported by recent authorities.—*The Law Times.*

CONCERNING THE READING OF MANY BOOKS.

Hobbes, of Malmesbury, used to say: "If I had read as many books as other persons I should, probably, know as little;" and the saying had a sermon in it which we have, most of us, been very slow to learn. We read too many books, and especially is this true of lawyers and law students. We remember to have seen a "course of law reading for students," recommended in some old book which, it was remarked, "could be accomplished in about *ten* years," and to an edition of Wynne's Eunomus there is prefixed a "plan of reading for special pleaders" that makes one's head ache simply to contemplate. Such a legal ground plan is not unlike Robinson Crusoe's goat pen, so large as to give him as little property in his flock as though he had no pen at all.

And the worst of it is that most law students pursue their studies, or rather reading, for it is not study, much on the same principle. One book after another is gone through hastily, mechanically, little remembered and less understood, and after a certain time they come to the bar with no clear, well-defined knowledge of any thing. In thinking of the average law student's career, one is reminded of Swift's witty remark, that the reason a certain university was a learned place was, that some persons took some learning there and few brought any away with them, so it accumulated.

A late learned professor in a law school used to remark to his classes that any man who *knew* the contents of three books, which he named, would be a better lawyer than there was in the State; and we do not doubt he was correct. The usual method of a law student is to read *seriatim* Blackstone, and Kent, and Greenleaf, and Washburn on Real Property, and Parsons on Contracts, and works on Practice, Bills and Notes, Partnership, Easements, Domestic Relations, Pleadings, Commercial Law, Agency and what not, until he has a sufficient smattering to enable him to pass a meagre examination and take his place at the bar. But after all this, how much does he really know, as a rule, on any one of the subjects named? Certainly not much. Now, had he devoted all his time to carefully reading and re-reading

Blackstone or Kent, can there be a reasonable doubt that his knowledge on all or nearly all the subjects would have been ten or twenty fold? Mr. Warren tells, in his admirable work on "Law Studies," that he once asked one of the most eminent political writers of the day, one who had been, on several occasions, signally successful in attacking the opinions of lawyers in parliament, how it was that, not being a lawyer, he was completely *at home* on legal subjects. "Why," was the reply, "I *study* a book which you lawyers only talk about or look down upon, Blackstone's Commentaries."

It is a conceded fact in military science, that a few disciplined forces are far more efficient than a much larger number of undisciplined men, and the same is true in the law. A few books, thoroughly mastered, will furnish a knowledge that will make one stronger and better able to cope with difficulties, than any number of books but half understood or remembered; or, as the Germans put it—and none better understand practical education—"nothing is so prolific as a little known well." The old Latin proverb reminds us of this fact—*Cave ab homine unius libri*—beware of the man of one book. He will always be found to be a formidable antagonist. His intimate knowledge of one great author will saturate his mind with the excellencies of that author's genius, will shape and sharpen his faculties, and he will be like a man who sleeps with armor on, ready at the moment. While, of course, in the law it is impossible to be a "man of one book" literally, yet, in its spirit and true meaning, it is not only possible, but desirable; that is, to pursue one system, to choose a few authors and to be thorough in a limited sphere, rather than superficial in one more extended. Sir William Jones, it is said, *invariably* read through every year the works of Cicero; Demosthenes copied and re-copied the history of Thucydides eight times: Montesquieu was a constant student of Tacitus; Chatham read Barrow's sermons until he could repeat most of them from memory; Webster read Plutarch's lives every year. These are but few of the hundreds of worthy witnesses who have, by example, testified to the value of iteration and reiteration. Each had his particular object, and how well he accomplished it we know. If logic or style or diction can be thus best acquired, so can the law. The student who shall take Blackstone or Kent and make that *his book*, who shall have it ever at hand, read, re-read, "marked and quoted;" who shall make incursions into other treatises and the reports, only to illustrate it and trace its doctrines, will have a more thorough, practical and comprehensive knowledge of the law than though he had gone through the entire curriculum of the law schools. In re-reading a book a man does not get precisely the same information that he did on the first reading, for the interval between the readings will call attention to a new order of facts, and, like the bits of glass in the kaleidoscope, they will assume new combinations and make new impressions.

There are very few legal text-books that should be read through, "from cover to cover." The others ought to be studied on particular topics in connection with the few aforesaid. It is a well-known fact that Dr. Johnson said he never read any book through but the Bible, yet Adam Smith said, "Johnson knew more books than any man alive." The secret of this is easily found in Boswell's remark: "He had a peculiar facility in seizing at once what was valuable in any book without submitting to the labor of perusing it from beginning to end."

This faculty of getting directly at what one desires in a book is of supreme value to the law student, and one which he can cultivate and greatly improve by confining his chief attention to a few books and using the others only as adjuncts. We are not speaking of the reports, for to them the student should constantly turn, but, as a rule, only in connection with the particular topic that he is pursuing in his text-book. He should carefully examine the authorities cited by his author and what later leading cases he can find on the subject, should master the facts and the reasons on which the decisions are based, and should then write out his results as a kind of annotation to his treatise. This process will make "every man his own author," will train his intellect, develop his reasoning powers, fix legal principles in his memory and make him a more thorough lawyer than any number of years' careless, half-interested, reading "by course," could do. He will have the substance instead of the shadow of real knowledge.—*Albany Law Journal.*

LIABILITY OF ATTORNEYS FOR THE ACTS OF CLERKS.

"Ye Gods!" cried Thackeray, "what "do not attorneys and attorneys' clerks "know in London! Nothing is hidden "from their inquisition, and their fam- "iliars mutely rule our city." In truth, not only in the "great metrolopus," as Mrs. Malaprop has it, but wherever law exists, the law-clerk is omniscient, and his activity all-prevailing; as Morris, J., puts it, "Law-clerks busy themselves in "everything, and are the best-known "people in every town." (*M'Cue* v. *James*, 5 Ir. L. T. R. 89). And although what songs the syrens sang, or what name Achilles assumed when he hid himself among women may now be accounted puzzling questions, as Sir Thomas Brown concedes, yet, we cherish the conjecture that, to the law-clerks of antiquity these matters were perfectly familiar. But of course, it is in the legal world especially that the law-clerk is master of all he surveys. He is the little wheel that makes the works move. "Lord Mansfield was in the habit of "saying, that the *quicquid agunt homines* "was the business of Courts of Justice: "if I may venture to extend the senti- "ment," adds Park, J., "the same may "perhaps be said of attorneys' clerks." How far an attorney is responsible for and bound by the acts of his clerks, is a question which we must answer by referring to the result of the authorities.

When a clerk, directed by his employer to have a defence prepared by counsel, signs it in the name of counsel without his authority, though not so prepared, the defence will be set aside, and the attorney, though unaware of the act of the clerk, will be ordered to pay the incidental costs. So it was held by the Court of Common Pleas, in a case decided on this day week. And certainly, as a general rule, the principle involved would seem to be commended by practical considerations. When Constable Staff, as Fielding relates, arrested "*inter alios*" a half-pay officer and an attorney's clerk, "discharge the officer and the law clerk," "said Squeezum, J.P., "there is noth- "ing to be got by the army or the law— "the one hath no money, and the other "will part with none." Indeed, in such case the learned justice might well have followed the precedent made by Wonter Van Twiller, condemning the constable to pay the costs. Again, when a clerk fraudulently simulated the seal of the Court to a writ, the writ was set aside, and the attorney was ordered to pay the costs (*Dunkley* v. *Ferrers*, 11 C. B. 457.) And so, when the clerk of the plaintiff's attorney extorted an excessive sum for costs, on a false statement that judgment had been signed, the Court ordered the attorney to refund the overcharge, and to pay the costs of an application against him personally, although he was proved to have had no actual knowledge of the intention (*Palmer* v. *Evans*, 1 C. B. N. S. 151). When the clerk of the plaintiff's attorney, having called at the office of the defendant's attorney, and received a sum of money in settlement of debt and costs in an action, embezzled the amount, the responsibility of his employer to recoup the loss to the plaintiff was held to turn on a question of fact, whether or not the clerk was the agent of the attorney for the purpose of receiving the money (*Re Geoghegan*, 32 L. T. R. 301.) A clerk has not necessarily *ex officio* authority to receive payment of claims sued for. As Littledale, J., observes, "Although a party puts his "case into the hands of his attorney, "who thereby becomes authorised to "accept payment, it by no means follows "that all the attorney's clerks have such "an authority also" (*Bingham* v. *Allport*, 1 N. & M. 398). There, it was held that a tender made to a managing clerk, who at the time disclaimed authority from his master, the plaintiff's attorney, to receive the debt, was insufficient (see *Marks* v. *Lahee*, 6 L. J. C. P. 69). Yet, in a more recent case, it has been held that a managing clerk, having the general conduct of the business, has authority to bind his employer and his employer's client, by such a compromise as would be within the scope of his employer's authority to make. (*Prestwitch* v. *Poley*, 18 C. B. N. S. 806). A great deal depends on whether the clerk is conducting clerk or otherwise, as well as on the extent to which a particular business may have been entrusted to his management. Thus, if the management of a trial were confided to him, he could con-

sent to admissions, &c., as if he were attorney (*Baker* v. *Black*, 8 L. T. Ex. 398). And the fact of his acting as conducting clerk, in his master's absence, would furnish ground for imputing authority to him to give an extension of time for pleading. So, an attorney was held bound by the undertaking of his conducting clerk to this effect, given to the defendant's attorney, although on the same day, in another place, the plaintiff's attorney refused himself to give the same undertaking to the agent of the defendant's attorney; and a judgment marked notwithstanding the clerk's undertaking, was set aside, the attorney having to pay the costs (*Young* v. *Power*, 7 Ir. Jr., N. S., 388, 9 L. T., N. S., 176). So again, notice of an act of bankruptcy given by one attorney's clerk to another would be insufficient, unless indeed in particular circumstances, and the clerk receiving the notice being managing-clerk (*Pennell* v. *Stephens*, 7, C. B. 987; *Prestwitch* v. *Poley*, 18 C. B. N. S., 806). Much also, as regards the binding character of acts of clerks, would turn on the place where they occurred—whether at the attorney's office, or elsewhere. Thus, where a judge's order was made for payment of debt and costs, with leave to sign judgment on default in payment, and, the costs being taxed by a clerk attending for the purpose, the amount was demanded from the clerk in the master's office, but was not paid; held, that this did not constitute a default, and that judgment thereupon marked was premature. (*Perkins* v. *National Invest. Soc.*, 26 L. J. Ex., 182). But *semble*, the clerk would have had authority to pay or receive costs at the office of his employer (*ib.*; *Re Geoghegan*, *ante*). Where, however, a rule of court, calling on an attorney to deliver a bill of costs to the attorneys of a former client, was served by their clerk, who demanded the bill, this was held insufficient as ground for an attachment, on his refusal to give the bill (*Ex p. Briggs*, 18 L. J. C. P., 184). An attorney may also be stopped from setting up the absence of authority on the part of his clerk, as when a clerk, by mistake, after the time limited received the debt and costs as indorsed on the writ, the attorney, not having offered to return the money, was held not entitled to go on with the action (*Hodding* v. *Sturchfield*, 7 M. & G., 957).

But, as a rule, the clerk has not, like his employer, a general discretion over an action or suit (thus to consent to an irregularity: *Hodson* v. *Dreury*, 7 Dow. 769). He is deemed, however, an authorised agent to receive service of notices, &c., and what is said by him in his office as to acceptance of process, &c., may be taken to be said by him as agent (*Fowler* v. *Roe*, 4 D. & L., 639). And a clerk in the employment of a defendant's attorney, coming from his office to the plaintiff's attorney, and offering payment of a bill of exchange, before action, has been held *prima facie* authorized to make the offer, amounting thereby to a waiver of the defendant's right to notice of dishonor (*Ryan* v. *Seymour*, A. M. & O., 181). If consulted confidentially, the clerk stands in the same fiduciary position as his employer, and communications to him will generally be governed by the same rules as to privilege. But communications made by an attorney's clerk, in reference to the execution of a *ca. sa.*, would seem to be outside the ordinary scope of his employer's duty in respect of the conduct of the action, and so not privileged (*Caldbeck* v. *Boon*, C. P., Trin. T., 1872). Where a clerk, in his master's absence and by his authority, received money for a client, but refused to pay the client, it was held that the clerk was only answerable to his employer and he to the client (*Stephens* v. *Badcock*, 3 B. & Ad., 354). In *Re Garbutt* (9 Moore, 157), the court refused to strike an attorney off the roll, on an affidavit stating that a former clerk, living in a town eight miles from the attorney's residence, carried on business at an office over the door of which the attorney's name was affixed; it not being shewn either that the clerk participated in the profits or carried on business on his own account (see also 115 G. O., 1854). Happily now-a-days, frauds of this description are unknown. Elevated by culture, and strengthened by the bands of social organization, attorneys' clerks, as a body, are above reproach; and, so applied, the climax of the Athenian orator's vituperation, of old applauded to the echo, were now tame indeed, "a rascal and villain, and—clerk" (*De falsa Legat.*, s. 98).—*Irish Law Times.*

CANADA REPORTS.

ONTARIO.

MUNICIPAL CASES.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Reg. ex rel. Lachford v. Frizell.

Municipal Law—Property Qualification—Occupant. —Construction of Statute.

A person having the mere possession of a lot vested in the Crown, determinable at any moment, has not such an estate in it as will qualify him under the Municipal Act; but he is nevertheless rightly assessed, under 32 Vict. cap. 36, sec. 9, ss. 2 (Ont.)

A lot was assessed thus.—"No 25, H. B., Yeoman, &c," under the head "name of taxable party," and then under the heading "name and address of the owner, where the party named in column 2 is not the owner," appeared the name of the respondent. His name was not bracketed with that of H. B., nor was it stated in any way to be a separate assessment. *Held*, that the roll shewed that the respondent was assessed for this lot and could qualify upon it.

[Chambers, 1872,—*Mr. Dalton.*]

The relator complained that the respondent, who claimed to be the Reeve of Tyendinaga, was not entitled to hold the office, on the ground that he had not the necessary property qualification. He was assessed on Lot 24, Con. A, Tyendinaga, as house-holder, and on Lot 40, in Con. 48, as a freeholder. Lot 24 was part of the Indian Reserve, and the respondent, being Indian agent, was allowed, in addition to his salary, to occupy this lot. The land was held by the Crown in trust for the Indians, and the respondent had possession determinable at any moment. As to Lot 40, he owned the fee, but had a tenant in possession. The assessment of this lot was as follows:—

Name of taxable party—

No. on Roll.	Name of Taxable Party.	Occupation.	H. or F.	Age.	Name of Owner, &c.	School Section.
25	Bowen, H'y	Yeoman		28	Well'gton Frizell	14

As to Lot 24, it was contended that the respondent was not the legal or equitable owner, proprietor or tenant.

As to Lot 40, it was urged that by the assessment as above set out, the names not having been bracketed, and there only being one number, the respondent was not rated in his own name on the last revised assessment roll, as required by 29, 30 Vict., cap. 51, section 21 and 32 Vict., cap. 36, shed. B. (Ont.)

C. S. Patterson, for the respondent.

R. A. Harrison, Q.C., for the relator.

Mr. Dalton.—As to Lot 24, Con. 4, Tyendinaga,—the defendant has in my opinion no property qualification in respect of it.

There is, I believe in this case, no one fact in dispute, and Mr. Frizell himself gives this account of his occupation of this land. It is Indian land vested in the Crown for the benefit of the Indians, and he, being Indian agent in that district, is allowed besides his income otherwise, to occupy this land, which he has accordingly occupied for nearly two years—not for any public use or purpose, but for his private advantage—the use of the land being given to him by the Indian Department, as a part of his salary in fact. I think the assessment against Mr. Frizell in respect of this lot was right, so as to bind him personally, but not the land, under sec. 9, sub-sec. 2, of the last Assessment Act, for he was in occupation for his own interest and advantage. But the assessment cannot qualify him, for he had not at the time of the election, as proprietor or tenant, a legal or equitable freehold or leasehold. He had no estate whatever, but a mere possession, which might be determined in an hour. See *White* v. *Bayley*, 10 C. B. N. S. 227 and *Mayhew* v. *Suttle*, 4 E. & B., 347, 357.

As to the other Lot, No. 40—The defendant is the owner in fee simple. It was in possession of a tenant at the time of the assessment. The amount of the assessment is sufficient, and the only question is, whether in point of form the assessment on the roll, if it be an assessment at all, is a sufficient rating under sec. 70 to qualify the defendant. Whether it is sufficient to render him liable for the taxes is, I suppose, the same question. It is singular that the form which is given in the Ontario Statute, 32 Vict., schedule B, is not followed—a thing so easy to be done. By the 26th sec. of 32 Vict. it is provided: "When land is assessed "against both the owner and occupant, or "owner and tenant (as is the case here), the "assessor shall place both names within brackets "on the roll, and shall write opposite the name "of the owner the letter F, and opposite the "name of the occupant or tenant the letter H "or T, and both names shall be numbered on "the Roll." This direction has not been followed here. It is in this way:—"No. 25, —Bowen, Henry—Yeoman—H.—(aged) 38"—then under the heading "Name and address of the owner where the party named in column 2 is not the owner," "William Frizell." The name of the defendant is not set down under that of Henry Bowen and bracketed with it, nor is the assessment against the defendant sepa-

rately numbered on the roll. Some other deviations from the proper statutory form will be observed. The defendant's name, however, is written in a column embraced by the general heading "Names of taxable parties," and that it was so written for the purpose of assessing him, is known from the other facts. Are these deviations then so essential as to render the assessment void? After examining the English cases and our own, as far as I have been referred to, or have been able to find them, I have come to the conclusion that the assessment is good. It would certainly seem an extraordinary thing, considering the class that assessors must necessarily come from, that variances from the form of the assessment should vitiate it. Suppose all the numbers of the assessments were left out for instance, must the municipality lose the taxes?

In *Cole* v. *Green*, 6 M. & G., 872; by a Paving and Lighting Act, Commissioners were empowered to enter into contracts: "Provided "that no such contract should be made for a "longer term than three years, and before any "such contract should be entered into, ten days' "public notice should be given, in order that "persons willing to undertake the same might "make proposals to the Commissioners, at a "time and place in such notice to be specified; "and all such contracts should specify the "works to be done and the prices to be paid for "the same, and the times when they should be "completed, with the penalties to be incurred "in case of non-performance; and the same "should be signed by the Commissioners, or by "any three of them, or by their clerk, and by "the person contracting to do the work; and "copies of such contracts should be entered in "a book to be kept for that purpose by the "clerk." It was held that the proviso applied to the duration of the contract only, and that the subsequent provisions were not essential, but directory, and that a contract signed, not by the commissioners or their clerk, but by their road surveyor, was not therefore void under the Act.

Then in *Morgan*, Appellant, v. *Parry* Respondent, 17 C. B. 334, it was held that an English Act which required the lists of voters prepared by the overseers *to be signed by them*, was in that respect directory only, and that a list not signed was nevertheless good. And, in *Brumfit* v. *Bremner*, 9 C. B. N. S. 1, it was held under the same statute, that the directions to the clerk to sign and deliver the book (the revised list of voters), to the sheriff, "*on or before the last day of November*," was not a condition precedent to the validity of the Register (which was not delivered till 13th January).

The cases in 6 M. & G. 872 and 17 C. B. 334, contain a great collection of the English cases on the subject.

There are several cases in our courts where the effects of deviations from the prescribed forms of the statute, in assessments, are considered. I refer to *Applegarth* v. *Graham*, 7 U.C. C. P., 171; *Reg. ex rel. McGregor* v. *Ker*, 7 U. C. L. J., 67; *Laughtenborough* v. *McLean*, 14 C. P., 175; *DeBlaquiere* v. *Becker*, 8 U.C. C. P. 167. I think they warrant the conclusion that the enactments as to the form of the assessment (in such particulars at any rate as are here in question), are directory only.

I think the roll in this case does show that the defendant is assessed for Lot 40, and that it is sufficient to charge him, and therefore to qualify him.

Judgment for defendant.

Application was subsequently made to the Chief Justice of the Common Pleas and to Mr. Justice Galt for a summons to set aside the judgment of Mr. Dalton; but they declined to interfere.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

In re B. & S., Attorneys, &c.

Attorney and client—Taxation—Substituted bill.

On an application to refer an Attorney's bill to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client; the Attorneys undertaking to receive in full of their fees, charges, &c., the amount of the original bill, or the amended bill as taxed, whichever might be the least.

[Chambers, 1871,—*Mr. Dalton.*]

A summons was obtained to tax the attorney's bill of costs for services in four interpleader suits.

Stephens shewed cause, and asked leave to substitute another bill, which, though for a larger amount, he claimed was only an amplification and more detailed statements of the same charges as were in the original bill which then were not given in detail. The original bill was not delivered for the purposes of taxation, but as shewing the amount which the attorneys were willing to accept as a cash payment.

O'Brien, contra, contended that the bill delivered must be the one referred to taxation, citing *Re S. & M.*, 8 C.L.J.N.S. 245, and cases there referred to.

Mr. Dalton.—I think the proper order to make under the circumstances would be to refer the substituted bill to taxation, upon the attorney's undertaking to accept such sum as it may be taxed at, or the amount of the original bill, whichever may be the least. It would often be inequitable to compel attorneys to have incomplete or defective bills referred to taxation.

Order accordingly.

CHANCERY CHAMBERS.

(Reported by T. Langton, M.A., *Barrister-at-Law.)*

Jackson v. Harriman.

Changing reference—Evidence of preponderating convenience necessary—Practice.

Upon an application by a defendant to change a reference, upon the analogy of applications at Common Law to change venue, the balance of convenience in favor of the change must be great and obvious; must be made to appear upon the affidavit, and upon a consideration of the plaintiff's as well as the defendant's witnesses and costs.

[Chambers.—November 21, 1872.—*Mr. Taylor.*]

A bill had been filed for the settlement of partnership matters and a decree was pronounced directing an acount to be taken, and the reference for that purpose was made to the Master at Toronto, as the place where the venue was laid.

The present application was made by *Mulock* to change the reference from Toronto to Barrie, upon the ground of preponderance of convenience. The affidavits upon which the application was founded, stated that the parties lived at Stayner, and it was believed that all the witnesses which would be called resided at or near Stayner, to which place Barrie was sixty miles nearer than Toronto, and although the same train carried them to both places, there would be longer time for their examination if held at Barrie, and they would be enabled to return home the same day.

Foster, contra, urged against the change that the material upon which the motion was founded did not shew a preponderance of convenience in the explicit manner required by the court. The affidavits should shew the *reasons* for belief that the witnesses to be called resided at Stayner: *Fisken* v. *Smith*, 2 Chy. Cham. 491. They should also show such preponderance by a consideration of the plaintiff's witnesses and costs as well as the defendant's: *Diamond* v. *Gray*, 5 C. L. J. N. S. 95; and this must be *made to appear* on the affidavits: *Tonks* v. *Fisher*, 2 Dowl. 22. It must also be *great* and *obvious*: *Durie* v. *Hopwood*, 7 C. B. N. S. 835; *Hellivell* v. *Hobson*, 3 C. B. N. S. 761. There would be a working day, viz., from ten to four, for the examination if conducted at Toronto. The same train conveyed the witnesses to both places, and the difference in the fare was slight; besides, on the evidence the balance of convenience seemed in favor of Toronto, where the plaintiff's solicitor resided.

Mulock replied, that the reasons for calling certain witnesses could not be given till the plaintiff had called his witnesses and it was known what evidence was required; but from the partnership business having been carried on in Stayner, where the parties lived, it was sufficiently apparent the evidence must come from that place.

Mr. Taylor, Referee in Chambers.—The analogy of applications at Common Law to change venue, seems to be followed here in motions to change venue or reference. Such being the case, I do not think the affidavits are sufficiently precise as to the witnesses to justify my making the order asked. Neither is there a case of preponderating convenience made out in favor of the change. I therefore must refuse the order with costs.

ENGLISH REPORTS.

ROLLS COURT.

Venn v. Cattell.

Specific performance—Vendor and purchaser—Delay in delivery of abstract—Repudiation of contract by purchaser.

When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract.

The conditions of sale under which a purchase was made provided that the abstract should be delivered within twenty-one days from the day of sale.

When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice that he declined to complete.

After one hundred and eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, and the abstract of the remaining lot was delivered a fortnight later, but was returned on the same day on which they were delivered.

On a bill to enforce specific performance of the contract

Held that as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser, and that the bill must be dismissed with costs.

[July 25, 1872.—27 L.T. N.S. 469.]

The plaintiff, who was the sole trustee and executor of the will of Charles Cheston, who died in the month of July 1870, having devised certain property to the plaintiff upon trust for sale, in pursuance of such trusts, caused a portion of the trust estate, including the property the subject of this suit, to be put up for sale by auction on the 28th Oct. 1870. The conditions of sale referred to the particulars of sale as annexed thereto, and provided, amongst other things, that the purchaser of each lot should immediately after the sale pay into the hands of Mr. Dolphin, the then solicitor for the plaintiff, a deposit of 10 per cent. in part payment of his purchase money, and sign the agreement at the foot of the conditions, with the blanks therein truly filled up for completing the purchase according to the conditions, and that the remainder of the purchase money should be paid to the vendor on the 25th March 1871, at the offices of the said Mr. Dolphin, at which time and place the purchase was to be completed. The conditions also provided that the abstracts of title should be delivered within twenty-one days from the sale. The defendant attended the sale and became the purchaser of lots 5, 8 to 24 inclusive, and 54 at prices amounting in the whole to the sum of 5542*l.* 5*s.*, and the following memorandum was signed by the defendant:

It is hereby agreed and declared that Thomas Cattell, Esq., has this day purchased lots 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 54, described in the annexed printed particulars, for the sum of 5542*l.* 5*s.*, under and subject to the above written conditions, and has paid into the hands of Mr. Robert Dolphin, Solicitor, Birmingham, the sum of 500*l.* as a deposit, and in part payment of the purchase money, and that the purchase shall be completed, and the remainder of the purchase money paid according to the terms of these conditions.

Dated the 28th day of October, 1870.

Tho. Cattell.

	£	s.	d.
Purchase money 5542	5	0
Deposit 500	0	0
Balance 5042	5	0

The defendant alleged that when he signed such memorandum it did not include lot 5, that the amount of the purchase money for lots 8 to 24 and lot 54 was not filled in, and that in the note at the foot of the agreement there were blanks for the amount of the purchase money, the deposit, and the balance, and that the figure "5" between the word "lots" and the figure "8," and the figures "5542*l.* 5*s.*" as the purchase money and the figures "5042*l.* 5*s.*" as the balance, had been inserted after he had signed the same, and without his authority or privity. He admitted, however, that he had signed a separate contract for the purchase of lot 5.

The defendant, at the time of the said sale, paid to Mr. Dolphin the sum of 500*l.* as a deposit.

No steps were taken by either party until the 15th Feb. 1871, when the defendant's solicitor gave the plaintiff notice in writing that in consequence of his not having furnished the defendant with any signed contract for the sale of the lots purchased by him at the auction, and of his not having delivered to the defendant an abstract of title relating to the lots so purchased within the time specified in the conditions of sale, under which the said properties were offered for sale, and of his not having complied with the said conditions in other respects, the defendant required him forthwith to repay to him the money paid by way of deposit upon the price at which the said lots were sold, and that the defendant declined to complete his purchase of said lots.

The plaintiff's solicitor, Mr. Dolphin, having died on the 19th Dec. 1870, leaving his papers in great disorder; and owing to the length and complication of the titles to some of the lots, no abstracts were delivered until the 24th Feb. 1871, when abstracts of the plaintiff's title to lots numbered from 8 to 24 inclusive, and 54 were delivered to the defendant's solicitor, who on the same day returned them. The abstract as to lot 5 was delivered on the 9th March 1871 and was returned to the plaintiff's solicitor on the same day.

On the 18th Jan. 1871, the defendant commenced an action against the plaintiff to recover the sum of 500*l.* paid as deposit, as money received by him for the use of the defendant; and on the 11th March 1871, this bill was filed to enforce specific performance of the contract for the purchase of said lots, and to restrain the defendant from proceeding with the action at law.

Fry, Q.C., and *Waller* for the plaintiff.—In this case time was not originally of the essence of the contract, and it can be made so afterwards only by giving notice to that effect.

Sir *R. Baggallay*, Q.C., and *Speed* for the defendant.

Fry, Q.C., in reply.

LORD ROMILLY.—This is a case, I think, of considerable importance, and I have taken a good deal of time to consider it, and I have also examined a great number of cases which bear upon

the subject. The point is a very simple one, but it appears to me to be one of considerable importance. It is upon a subject which is very familiar to us all, and is constantly occurring. The bill is a bill for specific performance. The question is, how long a person may wait, and what steps he may take, before enforcing the specific performance of a contract. The dates of course are very material, and it all depends upon them. It is rather material to mention what the facts were. There were a good many lots put up for sale, I think 17 or 18. The sale took place on the 28th Oct. 1870, and, by the conditions of sale, the abstract was to be delivered within twenty-one days, namely on the 18th Nov. When seventy-eight days had expired, that is, fifty-seven days after the appointed time for the delivery of the abstract, no step having been taken by either party, and nothing having been done at all, on the 15th Jan. 1871, the defendant gave notice to the plaintiff that he declined to complete his purchase, and required the deposit to be returned; and three days afterwards he brought an action against the plaintiff for the deposit, the deposit having been paid to the plaintiff. After one hundred and eighteen days had elapsed, that is upwards of three months after the appointed time, on the 24th Feb. 1871, the abstract of lots from 8 to 25, and of lot 54 was delivered, and on the very same day that they were received the defendant returned them all. He in no respect receded from what he had previously done—he returned every one of them. On the 9th March 1871, a fortnight later, the abstract was made complete by sending an abstract of lot 5, which was also bought, and on the same day the abstract was returned. The plaintiff was quick enough in filing a bill, because two days afterwards the bill was filed, namely on the 11th March 1871. Now the question is, whether the contract can be enforced in this court. It is said, and I think truly, that time was not of the essence of the contract, that is to say, time was not of the essence of the contract in the sense that it is sometimes understood, as in the sale of a public house where you are losing the trade; it was not a sale of a matter the value of which was fluctuating, such for instance as of foreign debentures or of foreign stock; it was not a sale to a body which can fluctuate, such as a Dean and Chapter or the like, or a sale such as has come before the court in late cases where there was a question of immediate residence. The case is simply this, whether—to put it in the words of Lord Loughborough in *Lloyd* v. *Collett* (4 Brown's C. C. 459)—there is any case in which, where the purchaser has refused to perform the contract after the time for doing so has elapsed, and the purchaser has never gone back from that, this court will enforce it. Several instances were given where that was done, or where it was said it was done, but most of the cases were cases of this description:—where the defendant accepted the abstract, and so in point of fact gave way to the lapse of time; and then having once given way to the lapse of time, the court has not held the delay binding on anybody, and so it goes on till at last somebody creates a new period from which time runs, as in the case of *Southcomb* v. *The Bishop of Exeter* (6 Hare, 213). But I want to know where a person says, "I have contracted that you shall deliver this to me on a certain day," and he does not do it for two months afterwards, and then the other man says, "I will not have anything to do with the contract," whether he can be bound to perform it? I am quite clear of this: that the modern train of authorities has all been to make the time much more strict, and very wisely so, and though it has not gone to the extent of saying it is to be the rigid strictness of a court of law, yet it is a strong thing to say that a man having contracted to buy property (and this property was apparently bought to sell again) he is to wait two or three months before the abstract is delivered, and then be bound to perform the contract. There are several cases where the defendant, by which I mean the purchaser, has applied to the vendor to deliver the abstract, and he has not done so, and the purchaser has thereupon said, "I will not accept it now," and he has not gone back from that view of the case, but has insisted upon it, and the court has refused to enforce the contract; but I am not sure that I have found any case which is exactly like this. The case of *Lloyd* v. *Collett* is as nearly as possible this case; and I cannot find that *Lloyd* v. *Collett* has been overruled or objected to in any authority or any text book on the subject. I think that the Lord Chancellor's judgment in that case is a very striking one. The judgment is not given where the case is reported, but is set out in a note to *Harrington* v. *Wheeler* in 4th Vesey, junior. The facts of the case are stated in 4th Brown; and in a note in 4th Vesey junior, at page 689, it is stated that the Lord Chancellor in *Lloyd* v. *Collett*, which was cited, pronounced the following judgment. The judgment was this, and I think it worth while to read it: "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should

be certainly known when a man is bound, and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say: the time is not so essential that in no case in which the day has by any means been sufferred to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, &c. might induce the court to relieve. But it is a different thing to say: the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it. In most of the cases there have been steps taken. Is there any case, in which, without any previous communication at all between the parties, the time has been suffered to elapse? I want a case to prove that, where nothing has been done by the parties this court will hold in a contract of buying and selling, a rule, that certainly is not the rule of law, that the time is not an essential part of the contract. Here no step has been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed." In the case before me it is three months, not six months. "If a given default will not do, what length of time will do? It is true the plaintiff must have considered himself bound after the day. So he was. He could not take advantage of his own neglect. He says, by my own default, this contract is void in law; I cannot succeed at law; on the contrary, the other party is entitled to recover back the money he has paid in expectation of the execution of his contract; therefore an equity arises to me. An equity out of his own neglect. It is a singular head of equity. The consequences of this idea, which I know has prevailed, have been extremely inconvenient. The hardship generally falls upon the other party. The utmost extent of relief, where the party is discharged at law, would be on making him full compensation. Is interest of the purchase money compensation? The time may go on for years. Suppose the subject was an estate sold for payment of debts; debts and legacies carry interest at 5 per cent.; the purchase money may carry 4 per cent. from the time the contract ought to have been completed. Where it is with a view to a re-sale, as in this case," (that is the case here) "what is the consequence? Here a man has purchased these ground-rents upon a speculation which is totally defeated. I see no reason to enjoin the action. You deliver yourself from that by paying the money. The action is against the auctioneer. I do not think the equity extends to him, for he personally contracts that he receiving the deposit money, will return it if the terms are not complied with." That is the judgment of Lord Loughborough in that case, and I think every word of it applies to this case, and I intend to follow it. I think it very desirable there should be a distinct rule laid down as to what time a person may continue not to perform his part of a contract. I do not mean at all to say that if the abstract had been delivered within two or three days, that that is not a case which equity would enforce specific performance of. Here the abstract ought to have been delivered on the 18th Nov., and it was not delivered on the 15th Jan. when the defendant says, I will have nothing more to do with the case, and then on the 24th Feb., the first abstract is delivered; and on the 9th March the delivery of the abstract is completed, and the defendant never varies a word from what he first said, namely, that he would have nothing at all to do with it, as he wanted to sell it again. I do not mean to say to what extent the rule is to go. I think the abstract must be delivered within a reasonable time, and if a man knows he cannot perform the contract within a reasonable time, he ought not to enter into it. I am of opinion this Bill ought to be dismissed, and I must make the costs follow the event. I shall be glad if the parties will appeal it, because then the Lords Justices will say whether the rule I propose to lay down is the correct one, or what rule is to be adopted in cases of this description. The rule I propose to lay down is this, that when a man enters into a contract, and says the abstract shall be delivered on a particular day, and it is not delivered within a reasonable time after that day, that thereupon the person who has bought the property is at liberty to say, I will have nothing more to do with the transaction. If he afterwards goes back from that and accepts an abstract, of course a totally different equity arises; but in that case I will not enforce specific performance, unless I am instructed by a higher tribunal that it is my duty to do so.

IRISH REPORTS.

QUEEN'S BENCH.

THE QUEEN v. THE DIVISIONAL JJ. OF DUBLIN.

Nuisance—18 & 19 *Vict.*, *c.* 121—*Certiorari.*

An order was made by Justices at Petty Sessions under the 18 & 19 Vict. c. 121, s. 12, that the owner should immediately disinfect a house, so that the same should be habitable and free from infection at the expiration of one month under penalties. By another order, made

before the expiration of the month, the magistrates ordered payment of the penalties. The Court quashed the latter order by *certiorari*.

[Ir. L. T. Rep. Dec. 21, 1872.]

On the 27th of October, 1871, the Justices made an order that John Rice, the owner of a certain house at Bridgefoot-street, should, immediately on the service of the order, renew a sewer and disinfect the rooms, so that same, at the expiration of one month from the date of the order, may be habitable and free from infection, under penalties of 10s. per day for non-compliance. On the 16th November, 1871, an order was made by the Justices for payment of penalties, under the first order, amounting to £4, and £1 12s. costs, a conditional order for a *certiorari* having been made.

J. O. Byrne (with whom was *Purcell*, Q.C.), for the Inspectors of Nuisances, showed cause. The magistrates had jurisdiction to inflict the penalty. But there was merely a technical irregularity, for which the Court will not quash the order of the magistrates, nor will it interfere with the exercise of their jurisdiction ; *Tinkler* v. *The Board of Works for the Wandsworth District*, 1 Gif., 412 ; *The King* v. *The Justices of Denbighshire*, 1 B. & Ad., 66.

C. Molloy and *J. A. Curran*, in support of the order, cited *Tomlins* v. *Great Stanmore Nuisance Committee*, 12 L. T. N. S. 118, Q. B.; *The Queen* v. *Jenkins*, 32 L. J., N. S. M. C., 9.

Whiteside, C. J.—We have no doubt about confirming the authority of the magistrates, or enforcing the jurisdiction they possess, nor do we think, though we have heard the case very well argued, that there is any difficulty in carrying the law into effect. It is a beneficial law, and we believe that the more vigorously it is enforced the better will it be, but it must be law that we are to enforce. The magistrates made an order on the 27th October, 1871 ; their jurisdiction is clear ; they entertain the complaint, and it is stated to them that a certain house has been so infected by what has been termed fever poison, as to be unfit for occupation and dangerous to health. I entirely subscribe to the argument of Mr. Purcell, that we are not to inquire into the discretion of the justices. Upon the face of the order the object in view is intelligible and distinct. My construction of the order is that they have ordered some work to be done in this neglected habitation—done within a month—so as to insure its being fit for occupation. I read the order in this way, that the work is to be completed—not to make the house a better habitation —but with the view of exercising the jurisdiction, wisely and judiciously exercising it, to remove a nuisance. The house is pronounced by the order to be unfit for habitation, and it is to be closed during one month. I confess, it would appear to me what the justices had to do, after having pronounced the order, was to see that the work was properly done within the time limited, so as to provide for the occupation of it within the month. What is the power of the magistrates ? By the 13th sec. of the 18th and 19th Vict., ch. 121, they may require the person to take such steps as will render a house safe and habitable, and to do such "work or acts as are necessary to abate the nuisance complained of, in such manner and within such time as in such order shall be specified," "and on their being satisfied that it has been rendered fit for such purpose, they may determine their previous order by another declaring such house habitable." What occurred in the case was this :— a summons to Thomas Rice was issued on the 16th Nov., 1871, to answer the complaint of the Inspector of Nuisances, in relation to the house being infected with fever poison. It appears to us it is impossible to read the summons and not to perceive that in reality it is a summons issued to and complaining of a person for not having executed all the works for the doing of which he had beeen given a month's time. It would not be possible for the justices, after they had made the order granting a month to do a thing, to inflict a penalty in a few days. By the 14th section of the statute, it is enacted, that "any person not obeying the said order for abatement shall—if he fail to satisfy the justices that he has used all due diligence to carry out such order—be liable for every such offence to a penalty," &c. Now, what is the offence for which he has been called upon to pay the sum of £5 15s. ? I cannot see that the proceedings are for anything but neglecting to do that which the party got one month to do, and he could not be guilty of violating the order within a week. I do not mean to say that the magistrate might not have issued a summons to bring him up ; and looking at the 20th section of the Act, I find that " where any costs, expenses, or penalties are due, under or in consequence of any order of justices, made in pursuance of this Act, as aforesaid, any Justice of the Peace, upon application of the nuisance authorities shall issue a summons requiring the persons from whom they are due to appear before two justices," &c. I do not think there has been a compliance with the Act of Parliament. We are of opinion that there should be a fresh summons before the issuing of the warrant. There should be a summons for not having closed the house. Then

the case would have been clear and formal. The magistrates have a jurisdiction which they have not exercised. The summons required by the Act has not been issued, and the conviction that should have been pronounced has not taken place.

Fitzgerald, J.—I concur in the decision of the Court upon the ground of public policy and public safety. It is our duty to assist the magistrates in carrying into effect the provisions of this useful Act of Parliament. The Legislature has given strong powers to the magistrates, and the reason why I comply with the application—that the order made by the magistrates under the 20th section should be quashed—is because there has not been any conviction for the breach of the order of the 27th October, 1871, nor the adjudication of a penalty of that breach of the law. The order of that date is all that it should be. It prohibits the use of the house, and directs that certain works shall be executed to render it habitable, and it is not alleged that this order was not, either in form or substance a legal order, and one that was capable of being enforced. I offer no opinion whether there should be a separate order under sections 14 and 20. Possibly, looking at the Act of Parliament, we might finally come to the conclusion that it might be done by one order, but it is clear that to enforce a penalty there should be a conviction for the offence, and an adjudication ascertaining the amount of the penalty. It is erroneous to say that under section 14 a penalty necessarily attaches to a non-compliance with its enactment; a party might satisfy the Justice that he had used due diligence, and might show a willingness, but inability, to comply with the provisions of the Act, and that he had used every exertion in his power. These are matters for the consideration and adjudication of the magistrate; he has to ascertain whether, under the 14th section, there has been any breach of the order; if so, he is to exercise his judicial discretion in determining what penalty should be inflicted—for there are two peualties, one inflicted for not having done the work, the other for a breach of the prohibition to occupy the house—and the magistrate may inflict the full fine, or reduce the penalty to the minimum amount. The Justices may exercise a discretion, and this will obviously appear by a reference to the 19th section of the Act, for under that section proceedings may be instituted in a Supreme Court to recover costs and expenses, but there must be a conviction and adjudication by the magistrates before, and I do not mean to say that you may not consider the two sections under one order. The only thing done by the magistrates was that which was done under the 20th section, and that fairly would import that the magistrates were satisfied. There had not been a compliance with the order, but that does not appear upon the face of the order to raise a question of jurisdiction. We are of opinion that before there has been a breach of the order, a conviction and adjudication, the magistrate could not make the order for payment of costs and expenses, and we declare that the order made under section 20 should be brought up to be quashed; but this will not prevent the law from being put in force, but we do not interfere with the order of the 27th October. There is no statutable limitation. The nuisance authorities can summon a party under section 14, and under section 20 procure an order for payment of costs.

Barry, J.—I concur in the judgment of the Court.

CORRESPONDENCE.

Professional Etiquette.

To the Editor of the Canada Law Journal:

Gentlemen.—What has the Bar of Ontario come to, when a person professing to be an "Ontario barrister" (at least his note paper is so headed) sends a letter to a lady, who he has learned has a claim against a company, asking her to allow him to sue them, and encloses an order for her signature, a copy of which I send you:

Sir,—I hereby authorize you to collect my claim against————, on the following terms: All risk and expenses to be taken by you; the undersigned to receive one half of the amount recovered, if successful. [Signature.]

Modest, very! Is this touting for business only, or does it amount to Champerty? *Qr.:* If the defendant succeeded, and judgment for costs issued against plaintiff, would this Ontario barrister be worth suing to recover it from him again? Your views on the subject of the above "order" might be of service, and I think would do a great deal to stop this sort of practice.

I remain yours truly,

Etiquette.

[We fear that the great increase in the number of practitioners in Ontario is dangerous to professional ethics. A case like

this brought before the Benchers, not to speak of the Courts, and rigorously dealt with, would have a beneficial effect upon those whose necessities are uncontrolled by a sense of what is due to themselves and to the honorable profession to which they belong.—Eds. L. J.]

REVIEWS.

The British Quarterlies for October, republished by Leonard Scott Publishing Co.,. 140 Fulton St., New York.

The numbers for this quarter are exceedingly interesting, and fully keep up the character of the Reviews.

The Edinburgh contains articles which discuss, amongst other matters, "New Shakesperian Interpretations," founded on the reproduction, in exact fac simile, of the famous first folio, 1623, by the new discovered process of photo-lithography. Then we have a sketch of the Corea, of which it is said, that "geographers know more of Central Africa and its mountains and river systems than they do of the interior of this mere promontory, interposed like a wedge between the seas of China and Japan." The present state of affairs in Japan had been spoken of in a former number, and this article is a valuable addition to our information on this part of the world, so rapidly rising in importance to European countries. The memorials of Baron Stockmar, who is spoken of by one of his friends as an "anonymous and subterranean being," is reviewed in this number, as also in the *London Quarterly*. The other subjects discussed are "Terrestrial Magnetism." "The Fiji Islands," "The Progress of Medicine and Surgery," "The Past and Future of Naval Tactics," &c.

The London Quarterly contains perhaps the most readable articles to the general reader. It commences with a never-failing subject of interest to Englishmen, the Duke of Wellington, on this occasion treated with reference to his capacity as a Cabinet Minister. Another matter of equal home interest is the completion of St. Paul's Cathedr .l. We fancy the contrast drawn between it and St. Peter's at Rome, most unfavorable to the former, will not be so pleasant to the hereditary cockney. "The Consciousness of dogs," "The Journal of a French Diplomatist in Italy," "The East African Slave Trade," &c., are the other articles.

The British Quarterly commences with "The Goths at Ravenna." The next article is headed, "Immortality," which takes up the question on the stand-point of modern thinkers, and, in arguing against the prevailing spirit of infidelity and scepticism, appeals to the facts and experiences of social life, the validity of which all acknowledge, forbearing reference to the authority of Scripture. The remaining articles, which we have not space to refer to at length, are, "The Railway System of England." "The Authorship of the Fourth Gospel," "The present phase of Prehistoric Archæology," "Sir Henry Lawrence," &c.

The articles in The Westminster Review, are "The Heroes of Hebrew History," The Public Libraries," "The Descent of Man," being a review of Mr. Darwin's last work, wherein he treats of selection in relation to sex. "France: her position and prospects." "The Æsthetics of Physicism," &c.

It has been held by the Court of Common Pleas in England in *Grimwood et al.* v. *Moss*, that, where a lessor, subsequently to Midsummer-day, brought ejectment for breaches of covenant committed prior to that day, and afterwards distrained for rent due up to the same day, the ejectment operated as an election to determine the tenancy, and that the distress, whether lawful or not, did not vary that election. Willes J. held that the distress was an act of trespass.

Law Society—Michaelmas Term, 1872.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

George Dormer, Beaufort Henry Vidal, Frederick Wm. Monro, Charles Corbould, James Fletcher, John Alex. Gemmell, William Roaf, John Augustus Barron, Roderick Stephen Roblin, Martin Malone, John Rowe, Alexander Fraser McIntyre, James Robert Strathy, Robert McMillan Fleming. Charles Henry Ritchie, George McNab, John Akers, John White, John Andrew Paterson, Robt. Sedgewick, Newman Wright Hoyles, James Bruce Smith, Thos. Langton, Hugh John Macdonald, Wm. Redford Mulock, Richard John Wickstead.

And on Tuesday, the 19th November, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

Albert Clement Killam, Charles Joseph Holman, John Crerar, Albert Lewis, Henry James Scott, Dennis Ambrose O'Sullivan, Eugene McMahon.

Junior Class.

Thomas Dalziel Cowper, James Dowell, Jarid Alex. Morton, Luther Kendall Murton, Samuel D. Raymond, Harry Symons, Louis Adolphe Olivier, Thomas Ellis Dunlop, Thomas Edward Lawson, Arthur O'Leary, Wm. John Franks, Albert Whitman Kinsman, Frederick J. Vaunorman, Jacob L. Whiteside, James Fullerton, John Jerman Manning, George Miles Lee, Daniel Webster Clendinnan, Lawrence H. Dampier, Edward Jackson Stuart, John Franklin Monk, Jas. Saunders Nainer, John Bishop, Raynaldo Wigle, James Bond Clarke.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 3 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding. —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR FEBRUARY.

2. SUN... *4th Sunday after Epiphany.*
3. Mon... Hilary Term begins. Articled Clerks and Students to give notice for inter-exam.
4. Tues... New Trial Day, Q. B.
5. Wed... Inter-exam. Law Stu. and Art. Clerks. N. T. Day, C. P.
6. Thurs.. Paper Day, Q. B. New Trial Day, C. P.
7. Fri.... New Trial Day, Q. B. Paper Day, C.P.
8. Sat.... New Trial Day, Q.B. Paper Day, C.P.
9. SUN... *Septuagesima Sunday.*
10. Mon... Paper Day, Q.B. New Trial Day, C. P.
11. Tues... New Trial Day, Q.B. Paper Day, C.P. N T. Day, C. P.
12. Wed.. Last d. for set. down and giv. not. re-h. in Chy. P. D., Q. B.
13. Thurs.. Op. D., Q. B. P. D., C.P. Last d. for ser. for Co. Ct. York.
14. Fri..... New Trial Day, Q. B. Open Day, C. P.
15. Sat.... Hilary Term ends. Last day for Art. Clks. and Students to give notice for prim. exam. and for call.
16. SUN... *Sexagesima Sunday.*
20. Thurs.. Tithes abolished in Upper Canada 1823. Re-hearing Term in Chancery begins.
23. SUN.... *Quinquagesima Sunday.*
24. Mon.... Last day to declare for County Court, York.

CONTENTS.

EDITORIALS:
- The Goodhue Will Act 37
- Modern Jargon 37
- English Appeals 37
- Measuring Distance 38
- Baron Pollock 38
- Judicial Suggestions for Law Amendments 38
- Concerning Statute Law 39
- Married Women—Their Rights 41
- Law Society—Hilary Term 43
- Rules of the Law School 43

SELECTIONS:
- Concerning Seals 45
- A Few Words about Many Reports 46
- Ladies of the Long Robe 47
- Bench and Bar 49

CANADA REPORTS:
- Practice Court:
  - Pasaud v. McEwan—
    Rescinding rule for new trial 50
- Common Law Chambers:
  - Escott v. Escott—
    Judge in Chambers—Setting aside final judgment—Filing affidavits 50
  - Moffatt v. Evans—
    34 Vict. cap. 12 sec. 12 (Ont.)—Service on Toronto Agent—Notice to plead 50
- Chancery Chambers:
  - Catt v. Moffat—
    Practice—Demurrer—Order to amend—Bill not amended—Revivor 52
  - Fullerton v. Keely—
    Gen. Orders 434 and 435—Infants—Decree in Chambers—Setting down 54
- Master's Office:
  - Keim v. Yeagley—
    Practice—Taxation—Revision—Powers of Taxing Officer at Toronto—Evidence 55

NOVA SCOTIA:
- Supreme Court:
  - Bowen and Wife v. Shears—
    Trespass of land—Statute of limitations—Adverse possession—Estoppel 56

IRISH REPORTS:
- Court of Common Pleas:
  - Loughnan v. Barry and Byrne—
    Sale of goods—Fraudulent misrepresentation—Unproductive cheque—Rescission of contract—Trover—Money had and received .. 57

ENGLISH REPORTS:
- Court of Exchequer:
  - Hilton v. Ankeason—
    Fences—Non-liability to repair—Straying of cattle from defects of—Distress damage feasant 64

CORRESPONDENCE 66
REVIEWS 66
SPRING ASSIZES AND CHANCERY SITTINGS .. 70
APPOINTMENTS TO OFFICE 71

THE Canada Law Journal.

Toronto, February, 1873.

The Legislature is again asked, by means of an amending act, to aid the children of the late Mr. Goodhue in defeating their father's will. With this action on the part of the promoters, the public have nothing to do, except to protest against legislation of such a vicious tendency. The Bill being an Estates Bill, has been sent to the judges to report upon. We can only surmise what their report will be from what they have expressed in their judgments. If they report against it, the fate of the Bill is sealed; unless, indeed, we suppose the impossible result of the House acting contrary to the opinion of that very body it has itself constituted to advise upon such matters as this. We very much mistake the Premier also, if he would permit the Bill to pass contrary to the public opinion, which has set its face against legislation which would tamper with the rights of private property. There has been too much of that sort of thing already in the Legislature of Ontario.*

The *Weekly Reporter*, seized apparently with a desire to keep pace with the non-legal press in the coinage of new words, lately headed one of its cases, *Re Cubley's Trusts*, 21 W.R. 170, in this way—"Pauper becoming *propertized*." Surely, law jargon is sufficiently barbarous already, without adding to the vocabulary by modern innovations.

Of all the judges of first instance in the English Court of Chancery, the decisions of V. C. Wickens are, as a rule, the only ones which go through appeal un-

* Since the above was written, the judges have in an unanimous report advised against the Bill. We will publish their report next month.

scathed. Of the others, but especially Malins V. C., the reversals of their judgments are, as the *Solicitor's Journal* puts it, "uncomfortably numerous." It is said that Counsel now advise after the following fashion: "Such is the effect of the late decision of V. C.—, but as it seems almost a matter of course to appeal against his decisions, you should wait a bit, or make enquiries if an appeal is entered, or likely to be."

The Exchequer Chamber, in *Mouflet* v. *Cole*, 21 W. R. 175, has definitely determined a much-vexed question as to the manner of measuring distance, in, for instance, covenants in restraint of trade, where a person binds himself not to carry on a certain business within five or six miles of a given point. They hold that it is to be measured by a mathematically straight line from point to point, as on a map, disregarding inequalities of ground and the curvature of the earth's surface. The advantage of such a mode of measurement is that it will not be liable to change with changing circumstances, but will remain permanently the same.

Mr. Charles Edward Pollock, Q. C., has been appointed to fill the vacancy in the Court of Exchequer caused by the retirement of Baron Channell. Sir George Honyman was mentioned as a likely man, but choice has fallen upon the son of the late Sir Frederick Pollock. The *Law Times* considers the appointment, standing alone, unobjectionable, but not the best that could have been made. It says:—

"The new Baron is what is known as a good all round lawyer. His experience has been of that miscellaneous character which makes a useful but not a powerful judge. The same remark may be made of the two previous appointments, and for this very reason it was hoped that one of our prominent commercial lawyers would be selected by the Government. Of all the courts the Court of Exchequer is the most colourless, if we put on one side the remarkable and, if we may use the expression, almost brilliant common sense of Baron Bramwell. The judges are painstaking and fairly able. The new Baron is cast in the same mould. Whilst, therefore, we have nothing wherewith to be discontented we have somewhat to regret, and trust that the mistake will be remedied when it becomes necessary to fill the expected vacancy in the Court of Common Pleas."

JUDICIAL SUGGESTIONS FOR LAW AMENDMENTS.

(I.) "I trust the Legislature will yet make the law of evidence what it ought to be—the means of bringing out the truth, fully and freely, untrammelled with the fetters and perplexities of a gone-by age and system. After a wife has been allowed, in an action to which her husband was not a party, to be asked whether he was 'a fit man to be believed upon his oath: *Annesley* v. *Earl of Anglesea*, 17 St. Tr. 1276; and after a wife has been permitted to prove that she was married to her husband before the time he swore he was married to another, a pauper, in a settlement proceeding: *Rex* v. *Inhabitants of Bothwell* 2 B. & Ad. 639; see *Reeve* v. *Wood*, 5 B. & S. 364; and since either husband or wife may prosecute the other criminally for personal violence done by one to the other, and may testify in the cause,—there need be no scruple in putting them under the like law in all civil proceedings where they are both, or either of them personally interested:" Per Wilson J., in *Toms* v. *Township of Whitby*, 32 Q.B. (Ont.) 252.

(II.) Speaking of 29, 30 Vict. cap. 42, s. 6, the same Judge remarks: "It is calculated to give great embarrassment to sheriffs, and to create great difficulty to execution creditors. . . . . It is an inconvenient method of securing to the creditor first against goods the like rank against lands, to which he is plainly en-

titled. . . . A simpler way would have been to have authorized the *fi. fa.* to issue against both goods and lands at once, with a stay of proceedings against lands till the goods were exhausted; in which case no difficulty of any kind would ever arise, and one execution would answer in every case instead of two:" *Gleason* v. *Gleason*, 4 Prac. R. 117. This is partially remedied by 31 Vict. cap. 25, (Ont.)

CONCERNING STATUTE LAW.

The Province of Ontario seems to be in a fair way of being governed overmuch. It is not only subject to the supreme legislative sovereignty of the Queen and the English Parliament, but also to the subordinate power of the Legislature of the Dominion of Canada, and, third in gradation, to the local authority of its own Provincial Assembly. Then, from one or more of these sources, we have sundry delegated functions of legislation entrusted to the judiciary and municipal bodies, which have their outcome in by-laws, rules of Court, and general orders. The law is now in a constant state of flux and change, not so much, as in former days, by the result of judicial decisions, as from the effects of legislative interference. Modern ideas have shot far ahead of the quiet wisdom which obtained in the days of Mr. Justice Fortescue Aland who, in the preface to his reports, tells us that the grand division of law is into the Divine Law and the Law of Nature, so that the study of the law in general is the business of men and angels. He says, "Angels may desire to look into both the one and the other, but they will never be able to fathom the depths of either," and he then goes on to give his opinion, modestly but firmly, that "of all the laws by which the kingdoms of the earth are governed, no law comes so near this Law of Nature and the Divine Pattern as the Law of England."

But the wonderful progress of modern times has produced a corresponding growth in the statute law of the realm and of the colonies, so that one may almost be tempted to say that the law of England and of Canada is now regarded as being chiefly of value because of its interminable capacity of amendment. There is a story recorded of Lord Coke, which Sir John Coleridge referred to the other day in the House of Commons. His lordship was one day playing at bowls with the Bishop of Norwich, when this dignitary, thinking he had hit upon one of the *mollia tempora fundi*, told his companion that he wished to ask him a question of law. Whereupon the great commentator observed: "If it be a question of the common law, I should be ashamed if I could *not* answer it; but if it be a question of the statute law, I should be ashamed if I *could* answer it." At that time all the volumes of the Statutes could have been carried easily in a wheelbarrow, yet such was Lord Coke's opinion as to the possibility of recollecting what Lord Thurlow afterwards emphatically called "the damned Statute Law!" We suppose it is quite useless to call the attention of the young law-makers of Ontario in Parliament assembled to these words, which we have penned more in sorrow than in anger. There is a rage for legislation abroad, and like other infectious disorders it will run its day in spite of pills and potions.

Yet there are three kinds of legislation wherein the Parliament of Ontario is exposed to special risks. The first we choose to indicate in the words of Mr. Markby, when speaking of the dangers which may attend subordinate legislation: "Where "the power of legislation is loosely con- "ferred on a variety of [bodies] it is cer- "tain there will be great confusion of "laws, and there is also great danger of "the worst of all evils, namely, of doubts "being raised as to whether the legisla-

"tive authority of some of the subor-"dinate bodies has not been exceeded. "For the supreme sovereign authority is "always obliged to allow the authority of "its subordinates to be questioned, in "some form or other, by judicial authority, "in order to keep up a check on their "usurpation of power; though sometimes "it resorts to that highly unsatisfactory "expedient for getting out of the diffi-"culty—an *ex post facto* ratification of "acts which are admittedly illegal."

The second arises from that dangerous kind of private legislation which is exemplified in the famous Goodhue case. The opinions of the learned judges in appeal, particularly that of Draper, C. J., the head of the Court, fully illustrate the evil of intermeddling with the testamentary dispositions of persons deceased regarding their property. It was but lately that we noticed one of the sprightliest judgments ever delivered by Baron Bramwell, wherein he makes a shrewd thrust at the Court of Chancery. He observes: "Originally the common law "treated the penalty of a bond as the "debt to be recovered, construing the "document on the principle that the "obligor in all probability meant what "he said. The Court of Chancery, how-"ever, thought that it knew what he "meant much better than he himself did, "and introduced, what I cannot help "calling the unfortunate practice of re-"lieving from the penalty on payment of "the sum named in the defeasance and "costs:" *Preston* v. *Davies*, 21 W. R. 128. But in Canada, instead of the Court of Chancery, it is the High Court of Parliament that merits the stricture when it assumes to know better than the persons themselves what testators should have done with their property.

The last case is the danger arising from short patchwork Acts introduced by volunteer members on their own responsibility, designed to cure some special case of hardship that has come under their own notice. The motive is laudable, no doubt, but it may prove disastrous. It was Lord Redesdale who said: "Re-"formers are too apt to look to one "grievance, and propose a remedy which "would produce a thousand." It is all very well when we find such a judge as Wilson, J., calling attention to the state of the law of evidence as regards husband and wife in the pointed observations already cited by us—it is right, in such a case, to bring in a bill, as has been done, to amend the law of evidence in that particular. It is time to legislate for the attachment of equitable debts, as is being done this session of the Ontario House, when we find a judge so careful and conscientious as the Chancellor thus expressing himself: "It is unfortunate in "the interests of justice, that the remedy "given by the Common Law Procedure "Act in case of garnishee proceedings "should not in terms apply to an equit-"able debt. The principle upon which "the Act proceeds applies to an equitable "debt as much as to a legal debt; and I "can see no reason why the creditor "should not have a remedy in the one "case as well as the other. As the law "stands it is an anomaly—but the remedy "is with the Legislature not with the "Court:" *Blake* v. *Jarvis*, 17 Grant, p. 204. But how many of the law measures of the Session find a foundation upon judicial utterances? The stand taken by the Hon. E. B. Wood against the experimental legislation of young members of the House has been most commendable, and we trust that the experience of the older heads may secure the withdrawal of all crude attempts at an amendment of the laws.

MARRIED WOMEN—THEIR RIGHTS.

The legal status of a married woman has been a subject of anxiety to Legislators of England. In our Ontario House there is a perfect craze on the subject, as evidenced by the Bills introduced this session. The old Common Law notion, that husband and wife are one person, is being rapidly destroyed. Legislation is now tending in the direction of making the wife "the best man of the two."

The first innovation was made by Courts of Equity, holding that a married woman possessed of separate property, and acting with respect to it, is compelled to act in all respects as if she were unmarried. But until recently there was no legislation of any kind, either in England or in Canada, altering her status because of her separate property.

It was in 1859 that the first act of the kind was passed, by the Legislature of the late Province of Canada. It recited that the law of Upper Canada, relating to the property of married women, was frequently productive of great injustice, and that it was highly desirable that amendments should be made therein for the better protection of their rights (22 Vict. cap. 34). It accordingly enacted that married women having separate property real or personal might hold the same free from the control or obligations of their husbands, and provided for the granting of orders for protection of separate earnings in certain cases, but it in no manner interfered with the estate of the husband or his wife's land, commonly called a tenancy by courtesy. It enabled married women to devise their separate property, but gave them no power to contract.

It was reserved for the legislature of Ontario in its wisdom to pass an act abolishing tenancy by courtesy, enabling a married woman to contract, enabling a wife to insure the life of her husband, enabling her to hold stocks in banks, insurance and other joint stock companies, to maintain actions in her own name, and generally do whatever she thinks good in her own eyes, (35 Vict. cap. 16). This act is carelessly drawn and leaves room for doubt on various points, and is an endless trouble to those upon whom it devolves to apply and interpret it.

The minor idea of separate estate is now merged in the larger idea of separate existence. The old idea of unity of interest and unity of purpose, producing domestic bliss, is exploded. It is now supposed that families can be better brought up by having two heads to the house, and two houses also if thought desirable. Dependence of the wife on the husband is a thing of the past. Wives must be taught to depend on their separate estates, and if that be found insufficient the ability to insure the lives of their husbands and collect the insurance money, however sudden or mysterious the deaths of the husbands, will be all that is necessary to replenish the purse of the sorrowing widow. All that now is required to cap such legislation is to declare that every woman shall be a man, the provisions of nature to the contrary notwithstanding.

Sometimes we labour under the hallucination that legislation is needed to remedy some grievance or remove some abuse. Our fathers acted on some such principle, but now without grievance and without abuse it would seem that there must be legislation for the sake of legislation. Submission to endless and needless legislation seems to be the doom of man. Members of Parliament now we fear legislate not so much to meet the necessities of the people as to gratify their own vanity. With legislation for the sake of legislation we have no patience, and against it, as against all change for the sake of change, every lover of his country must strongly protest.

The Bills which have so far been introduced are only five in number; how many more are coming we do not know. Four of them are respecting conveyances by married women, and one is to amend the act to secure to wives and children the benefit of assurance on the lives of their husbands and parents. The most comprehensive and logical of the first batch would, by its first section, give a married woman full power to convey her real estate or chattels by any form of conveyance by which, if she were a *femme sole*, she could convey the same without the consent of her husband, and without any examination before any judge, or any other man, in the same way as if she were sole and unmarried. (It is perhaps defective in not providing that the would be grantor should, before executing any conveyance, obtain the consent in writing of at least two of her female bosom friends, with their coinciding reasons appended thereto. We throw out this suggestion as likely to prevent undue haste.) The second section simply abolishes tenancy by the courtesy. Another Bill would render the concurrence of the husband unnecessary in the case of his being a lunatic, idiot, in prison, beyond seas, living apart from his wife by mutual consent, or incapable of executing a deed from any other cause whatever, provided only that the county judge must dispense with such concurrence. Another Bill would make a somewhat similar provision, requiring however the consent of a judge of one of the superior courts. The remaining provisions in these and other Bills are intended to get rid of any possible objection to conveyances by married women, where there may have been defective execution under previous statutes. Such measures as these, if careful provision be made to prevent injustice, are in the main unobjectionable.

We do not pretend to deny that there has been much cause for some provision to emancipate a woman from a husband who reduces his wife and children to beggary and starvation, and squanders his and their earnings in drink, or for a measure which, if possible, might protect the wife from a husband's brutality. But we must implore a little caution before crude Bills are rushed through the House with break-neck speed: resulting in acts which tend not only to loosen the matrimonial tie, but which disarrange the laws of property, open the door to all sorts of fraud, and make those very married women whom it is designed to protect the prey of designing wolves in sheeps' clothing.

Looking at the remedial clauses in some of the Acts and Bills we have referred to, one is apt to exclaim how was it possible for married women to have existed before such legislation. If the provisions therein contained are really necessary to do justice to the rights of married women in the past, they must have been indeed a downtrodden race. But modern history fails to show that such was their condition, except in peculiar cases which have been guarded against as fully as would seem possible in such a delicate matter. The danger of speculative legislation is that abuses will be created where none now exist, and this is a danger which "prentice hands" at legislation seem to overlook.

In many respects the old Common Law under which our mothers, grandmothers, and great grandmothers lived and died was the perfection of reason. Legislation of a social character where no such legislation is needed is the perfection of folly, not to say madness. We think there has already been too much sentimentalism on legislation as to married women. We doubt much if their happiness is at all likely to be promoted by legislation which they do not want, which they have not asked, and which when obtained will be but little used, except for purposes of fraud.

It is just possible that such a state of things may arise as will enable the wife who owns all the property to make all the profit, while the husband who owns nothing will make all the losses. Division of responsibility in such matters is detrimental to the public good. It is the interest of the public that men should honestly pay their debts and not be encouraged to live in affluence in defiance of their creditors, upon the so called separate estates of their wives. We shall be greatly mistaken if the tendency of such legislation as we have noticed, is not to promote domestic unhappiness, and encourage widespread fraud.

LAW SOCIETY.

Hilary Term, 1873.

CALLS TO THE BAR.

The following gentlemen passed the necessary examinations this term, for call to the Bar:—Messrs. John G. Killmaster, (Simcoe), without an oral examination; Robert Heber Bowes, (Toronto), having passed last term as an Attorney, also without an oral; Messrs. Isaac Baldwin McQuesten, (Hamilton); James Richardson Roaf, (Toronto); and Allan J. Lloyd, (Barrie), after an oral examination.

ATTORNEYS ADMITTED.

The following gentlemen were admitted to practice as Attorneys:—Mr. R. J. Wicksteed, of the Quebec Bar; Messrs. Robert McMillan Fleming, (Toronto), James Bruce Smith, (Lindsay), and John G. Killmaster, (Simcoe), without an oral examination, having obtained more than three-fourths of the maximum number of marks. Messrs. Allan J. Lloyd, (Barrie), Peter Cameron, (Kingston), Isaac Baldwin McQuesten, (Hamilton), and James Richardson Roaf, (Toronto), also without an oral, having already been called to the degree of Barrister-at-law; and Messrs. Rupert Etherege Kingsford, (Toronto), and Alex. Sampson, (Toronto), after an oral examination. The names in each list are given in the order of merit.

STUDENTS ADMITTED.

The following gentlemen were admitted as Students-at-law, having passed the required examination.

In the University class:—Messrs. James Joseph Wadsworth, M.A., Alexander Haggart, B.A., Samuel Clarke Biggs, B.A., Elliott Travers, B. A., Julius Lefebure, B.A. And in the Junior class:—Messrs. Charles H. Connor, (974 marks out of a possible 1000), Thomas G. Meredith, (890 marks).

RULES OF THE LAW SCHOOL.

We have published in another place a short advertisement on this subject; and in last month's issue we alluded to the objects and Constitution of the Law School. We now publish *in extenso* the "Rules for the establishment of a Law School." This will probably give all the information which students can want on the subject; if not, we shall be happy to do what we can to put right any of the cautious ones who may be in doubt. Before asking any questions, however, we should recommend our young friends, as a matter of practice, carefully to read the rules, and fully discuss the doubtful point in their own minds, or among themselves. The result will probably be that the trouble of a letter may be saved, and themselves be certainly much benefitted.

The Rules are as follows:—

1. The Law Society hereby establish a Law School.

2. The staff of the Law School shall consist of Four Lecturers, who shall be Barristers-at-Law, and hold office for three years, and one of them shall be appointed by the Benchers, President of the Law School.

3. The Lecturers shall be styled of General Jurisprudence, Real Property, Commercial and Criminal Law, and Equity.

4. The course in the School shall consist of Lectures, Discussions, and Examinations, between the first of November and the first of May.

5. The attendance in the School shall be voluntary. The students shall be divided into the junior class and the senior class. Any student or articled clerk shall be entitled to admission to the junior class, and having passed through the junior class or being of two years' standing on the books of the Society or under articles to admission to the senior class.

6. Intermediate and Scholarship Examinations for Special Honors, Certificate of Fitness, and Call to the Bar, shall be conducted in the Law School, and may be had either in term or vacation as the Treasurer of the Law Society shall from time to time determine, and all such examinations, except Intermediate, shall be conducted in the presence of three Benchers, who shall attend in rotation, or provide substitutes.

7. Scholarships shall be of the same tenure and value as at present, and shall be open to general competition.

8. Special Honors shall consist of periods of allowance granted in pursuance of the Statute; any student in the School who has attended courses of both the junior and senior class, and passed the requisite examinations, shall be awarded a reduction of six, twelve, or eighteen months; or who has attended the course of, and passed through the senior class only, and passed the requisite examinations, shall be awarded a reduction of six or twelve months, according to the results of the examinations in each case.

9. All periods of allowance granted shall be taken and allowed as a part of the term of studentship or clerkship on call to the Bar or admission as an Attorney; and if allowed to a student, shall be available to him as an articled clerk, and if allowed to him as an articled clerk, shall be available to him as a student.

10. The Law School shall furnish Convocation certificates of the results of the various examinations signed by the President of the School, which shall be confirmed by Convocation before taking effect; and any period of allowance granted and confirmed, may be certified to the person to whom it is granted, by the Treasurer of the Law Society, under his hand and the seal of the Society.

11. The duties of the Lecturers shall be to deliver *viva voce* lectures; to prepare all questions for the examinations, whether oral or written; to select all questions for discussion; to preside in turn at meetings for discussion; to attend all examinations; and to arrange the hours for lectures, examinations, and discussions; and all questions for examination and subjects of discussion shall be approved by the President of the School.

12. There shall be a Council of the Law School, to be composed of the Treasurer of the Law Society, the Chairman of the Legal Education Committee, and the President of the Law School.

13. The Council of the Law School shall arrange the subjects and books for lectures and examinations, and the days for the several examinations, except those during the course in the School, which shall be fixed by the lecturers, shall have power to sanction any change of duty among the lecturers, and to grant leave of absence to any of the staff, or any student in the School. The Council shall also publish whatever they may deem necessary.

14. The salaries of the lecturers shall be as follows:—The President of the School, one thousand dollars per annum; the other lecturers, each eight hundred dollars per annum; such salaries to be paid quarterly from the first day of January next.

15. The first course in the Law School shall be of three months only, from the first of February to first of May, 1873.

Not content with the elective franchise, seats in legislatures and in congress, etcetera, the colored men are about making strong efforts to secure a recognition from the administration by the appointment of a negro to the cabinet of the next term. The coming man is John M. Langston, a well-known colored lawyer, and the coveted position the attorney-generalship. The arguments advanced are that the colored men have, as a class, stood by President Grant, and have contributed largely to his re-election, and are therefore entitled to this recognition at his hands. The Washington *Chronicle* is in the movement. Considering the saltations of the colored race during the last five years, their representation in the cabinet is by no means improbable, but it will doubtless be as well for all parties to have that event postponed for a time.—*Albany Law Journal.*

SELECTIONS.

CONCERNING SEALS.

Few things will bear less looking into, with other eyes than those of habit, than the theory of the common law concerning seals. Established as this theory was in days of ignorance, it derives its support from prescription and usage rather than from intrinsic worth. The fact is that the law moves much like the gods of Homer—an interval of ages between the steps. In that alone we are accustomed to forget that the world is a world of progression, and that what was good three centuries ago may possibly not be good now. In that alone we are wont to believe that the common law, like another Minerva, was knocked, complete, out of a few sage Anglo-Saxon heads, and that all that remains for subsequent generations to do is to hand this "torch of truth" along the line. While it comes rather hard to conscientiously believe that the common law is literally the perfection of human wisdom, we can readily concede its many and great excellencies. What it needs is pruning—the lopping off of some things that have outlived their usefulness. To the plain man, unversed in the wonderful mysteries of the law, the legal effect of a seal can hardly fail to seem less than a miracle. The simple wafer must appear to him like "some amulet of gems annealed in upper fires." Why it should have the consecrating influence the law imputes to it, he will never be able to understand, and we very much doubt if any one else will ever understand it.

A little investigation of the history of seals shows, clearly enough, that they were originally used only as a make-shift for writing. Blackstone gives the following account of them: "The method of the Saxons was, for such as could write, to subscribe their names; and whether they could write or not, to affix the sign of the cross, which custom our illiterate vulgar do, for the most part, to this day keep up by signing a cross for their mark, when unable to write their names." "In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued when learning made its way among them, though the reason for doing it had ceased. At the conquest, the Norman lords brought over into this kingdom their own fashion, and introduced waxen seals only instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward I, every freeman, and even such of the more substantial villians as were fit to be put upon juries, had their distinct particular seals."

A seal was certainly useful to a Norman that could not write, and of significance when each had his particular signet; but when writing became common and the distinctive character of the seal lost, sealing became a mere hollow form; as Blackstone says, "the reason for doing it had ceased." At common law a seal was "wax impressed, because wax without impression is not a seal" (3 Inst. 169); but even these requisites, *wax* and *impression*, are dispensed with in most, if not all the States, and in some of them a mere scrawl of the pen is held sufficient. Not equal to the task of freeing ourselves from this venerable superstition, we make the observance of it as easy and meaningless as possible. Chancellor Kent thought that this legalizing of pen-flourish seals "is destroying the character of seals, and is in effect abolishing them and with them the definition of a deed or speciality, and all distinction between writings sealed and writings unsealed." 4 Kent's Com. 445.

Now, to the lawyer, accustomed to look upon a seal much as a heathen does upon his idols, this may seem very bad, but to a layman it would probably appear of little moment whether the "distinction between writings sealed and writings unsealed" were preserved or not.

It seems to us rather absurd to be told by learned judges that "sealing is a relict of ancient wisdom," and yet such expressions are found in our reports of comparatively recent date. For instance, in *Jackson* v. *Wood*, 12 Johns. 73, we find the following: "This venerable custom of sealing is a relict of *ancient wisdom*, and is not without its real use at this day. There is yet some degree of *solemnity* in this form of conveyance. A seal attracts attention and excites caution in illiterate persons, and thereby operates as a security against fraud. If a man's freehold might

be conveyed by a mere note in writing, he might be more easily imposed on by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a note or a letter." This is simply begging the question. So long as our laws relating to attestation and acknowledgment of conveyances are preserved there is little danger of one's conveying his freehold by "a mere note in writing," or of his mistaking the character of the instrument he is signing. The danger is surely not lessened by the seal, considering the character of the seals in common use. But aside from this, the reason is very weak. If a man can write he can read writing and can know what he is signing. If he cannot write, he is too ignorant to know any thing about the *solemnity* of a seal. Besides, the seal is usually, we might say always, affixed by the scrivener, and the parties pay little or no attention to it, and know little and care less about it.

We do not object to seals for the reason of the trouble of affixing them, but because they have been and are the fruitful source of perplexities and distinctions in contracts—of litigations, of dishonesty, and of inequity. Years of toilsome research would hardly make one perfect in the reported cases on the question of seals.

Take a single case, that of *Jackson* v. *Wood*, to which we before alluded. The question was solemnly discussed whether a freehold could be conveyed without a seal. The party selling the land received its full value; the instrument of conveyance was ample and explicit, and was signed in the presence of two witnesses. But the talismanic charm of the seal was wanting, and, therefore, it was decided that the heirs of the grantor should recover back the land, though it had been in the possession of the purchaser for twenty years. So much for the lack of a little wafer. So, again, in another case, *Ayres* v. *Harness*, 1 Ohio, 368, a person indebted to another, in a sum not exactly ascertained, wrote his name upon a blank paper and made his seal (a scrawl) in the presence of a subscribing witness, and authorized that other to fill out an obligation for the amount found to be due. The paper was filled up accordingly, but the scrawl was there, and the obligation was held, *for that reason*, invalid. Had that been omitted the legality of the instrument would have been perfect; and yet, according to the theory of seals, they import deliberation, and, therefore, much more than a signature, should bind the obligor. This result of sealing may be law, but it is neither justice nor common sense. Examples might be multiplied indefinitely, but enough, we trust, has been said to lead to the conviction that the seal is nothing more than a naked, useless, absurd formality, expressing nothing, meaning nothing, proving nothing; while, at the same time, the most important legal consequences are suffered to depend upon it. Is it not time that this absurdity was dropped out of our law?—*Albany Law Journal.*

A FEW WORDS ABOUT MANY REPORTS.

It is the general impression of the legal profession that they are "over reported"—that the rapid increase of the reports of judicial decisions is a grievance. It is thought that a vast number of reported cases is an incumbrance and stumbling-block which impede the acquisition of a knowledge of the law as it exists; that it "destroys the certainty of the law and promotes litigation, delay and subtilty;" and that it imposes a needless and onerous burden upon the purse and time to purchase and study even a portion of the annual issue. While this may be partly true, there are considerations on the other side which it may be as well for us not to forget.

It is a well-known fact that the diversity of relations which arise in life is so boundless, the modifications to which property is susceptible so various, the combination of circumstances so shifting and complex that legislation must necessarily be general. The result of this is, that but comparatively few of our rights or duties are or can be prescribed by positive law. For all these we are left to the wisdom and discretion of the judges, who deduce from the general propositions the legal corollaries applicable to each particular case. These deductions form the great body of the law of the land, and are, as Kent says, "the best evidence of the common law." These decisions become precedents for future cases resting

upon similar facts, and are regarded as the "highest evidence which we can have of the law applicable to the subject."

Now, considering the infinitely various rights, relations and duties of men, the cases upon which judges are called to adjudicate are constantly presenting new phases and different combinations of circumstances, so that it not unfrequently happens that a judicial decision upon analogous facts cannot be found. The greater the number of reported cases, the more likely are we to find the opinions and judgments of wise and experienced judges upon cases similar to those we may have in hand. And we all of us know how valuable is even one good precedent, and how diligently and anxiously the books are searched therefor.

But it is urged that this multiplication of reported decisions, some of which will no doubt be erroneous, will furnish mischievous precedents to those judges of narrow or timid minds, who, entirely ignoring reason and principle, follow the precedents as blindly as the Pagan deities followed the decrees of Fate. Such cases are not likely often to occur, and when they do it is fairly questionable whether the following of a bad precedent is not the lesser of two evils, for such a judge is likely to go wrong any way, through influence of public opinion, or of the wealth and standing of one of the parties, or of the power of an advocate, or of some of those countless things that so continually shape the actions of the weak and timid. If a judge be arbitrary or corrupt he will be much more likely to do justice with two or three precedents to restrain him, than if left untrammelled to gratify his own passions or prejudice.

One great advantage derived from the publication of judicial decisions is the beneficial influence it has upon the judges. No judge is apt to decide a case rashly or corruptly, or against the known law, if he knows that his decision will be exposed to public notice and criticism. Mr. Justice Blackburn said recently: "The only real practical check upon the judges is the habitual respect which they all pay to what is called 'the opinion of the profession.'" It is only when decisions are made "*in tenebris*, or *sub silentio*," as Lord Coke has it, that much is to be feared from the bench.

When the judges' decisions are made public, they feel that each one will not only put at stake their reputation for wisdom and integrity among their contemporaries, but must abide the judgment of posterity; and they therefor act under a deeper sense of that power, which is the great regulator of human conduct—public opinion.

It is quite true that few, if any lawyers can afford to purchase all the reports, and none can ever read all the cases, but this is no reason why reports should not be issued. Every one can make his selection according to his needs and ability. He will have occasion to read but a comparatively small portion of the cases, but by the aid of the excellent digests, indexes, and works of reference extant, he will have access to all that is really valuable. We never hear the complaint made that there are too many books published in the other professions and sciences, although no one can read or even purchase all the works that have been written on many of the sciences,—and yet we complain of too many books on the law, in the ashes of which it is said are taken up, "the sparks of all sciences in the world."—*Albany Law Journal.*

LADIES OF THE LONG ROBE.

"But what profession is your choice?" asks Mephistopheles; to whom the student, "Law shall not ever have my voice." "In this, I own, you show discerning; I know, and do not love this learning." But, is it possible that the student now should be a lady, and that the law should be her choice? The answer is furnished by the following extract from *The Law News* (St. Louis, U. S. America, Nov. 22, 1872):—

"Mrs. Clara Hopgood Nash, of Columbia Falls, has been admitted to practice as an attorney and counsellor-at-law in the Supreme Judicial Circuit of Maine. She has the honor of being the first lady admitted to the bar in New England.

"Miss Lemma Barkaloo, whose death is so deeply regretted, was the first of her sex admitted to the St. Louis bar.

"Miss Phœbe Couzins promises a successful career in the Missouri practice. Her fine talents entitle her to a high rank in her profession.

"Mrs. Bradwell, of the *Chicago Legal News*, has demonstrated the fitness and ability of her sex to occupy legal stations with high credit."

Commend us especially to the learned editress. Having demonstrated the legal aptitude of her *sex*, the only question remaining is, Who will be the first to attain the highest judicial promotion? Shall it be Mrs. Baron Bradwell, Miss Justice Phœbe Couzins, or Lady Chancellor Clara Hopgood Nash? The ex-member for Derry, indeed, replying to Sir J. Coleridge, in the debate of the House of Commons last session on the Woman's Suffrage question, though admitting his consciousness that many a judge had been an old woman, submitted "that was no reason why every woman ought to be a judge." The St. Louis *Law News* does not see this. Since when Numa listened to sweet Egeria, has not the sex, "the favorite of the law," evinced its peculiar legal capacity? Juvenal describes the Roman ladies, in his time, as eager to refine upon

> "The finest subtleties of law,
> And raise litigious questions for a straw;
> They meet in private, and prepare the bill,
> Draw up the instructions with a lawyer's skill,
> Suggest to Celsus where the merits lie,
> And dictate points for statement or reply."

And doubtless, whatever the *quodlibet* propounded to your lady of the long robe —the English Inns of Court have just heard of her, and her inevitable incursion we, too, must anticipate—"the Gordian knot of it she will unloose, familiar as her garter." What if, ere yet, "the mute wonder lurketh in men's ears to steal her sweet and honey'd sentences," some natural diffidence beset the fair aspirant. in her first acquaintance with "the tedious forms, the solemn prate, the pert dispute, the dull debate" which, according to Sir William Blackstone, occupy the attention of "the drowsy bench, the babbling hall." "All orators are dumb when beauty pleads," says Shakespeare, and besides, the lady is only, like Curran, to imagine that she feels her little ones tugging at her gown, and, like the great orator, she will forthwith be enabled to add the attraction of her voice to the rhetoric of her glance. Then shall Miss gradually advance, bully your witnesses, and "sound her quillets shrilly." In the next day's paper, a critique of her performance will appear, nauseating as those of which the stage now enjoys a monopoly. We shall be told that the fine talents of Miss Augusta Coke entitle her to a high rank in her profession, that, in consequence of a slight cold caught at a ball on the previous evening, her exquisite soprano voice was not as liquid as usual, during her powerful appeal in the case of *Smith* v. *Smith*, but that, later in the day, we were happy to observe that she had quite recovered, charmed the Barons of the Exchequer in *Jones* v. *The Lord Lieutenant*, and, according to her wont,

> Dropt manna, and could make the worse appear
> The better reason, to perplex and dash
> Maturest counsel learned in the law.

Certes, your sweet girl Templars would protest against "sitting under" an effete old bachelor, ætat. 87, as lecturer, who, if he thought to improve the occasion, would "woo in language of the Pleas and Bench." But verily, many a change the latter days will bring forth. And revolution, we need hardly add, will also take place in our law reports. No longer dry legal decisions like *Loughnan* v. *Barry*, our reports shall revile the *Case of Swans* (7 Rep.), where it is held that cygnets belong equally to the owner of the male and the owner of the female swan, "the "reason therefor being founded on a "reason of nature; for the cock swan is "an emblem or representation of an affec- "tionate and true husband to his wife, "above all other fowls; for the cock swan "holdeth himself to one female only, and, "for this cause, nature has conferred on "him a gift beyond all others; that is "to die so joyfully, that he sings sweetly "when he dies; upon which the poet "saith:—

> "'Dulcia defecta modulatur carmina lingua
> Cantator, cygnus, funeris ipse sui, &c.'"

Of course the text-books of the future will come out on toned paper, with illustrations by Millais. And the leaders of the Irish Law Times will become quite anacreontic; while a dictum of Fitzgerald, B., will be cited along with a quotation from Tennyson, for, as the father of English jurisprudence saith, "It standeth well with the gravity of our lawyers to cite verses." We shall endeavour to secure the service of an epicene editress, and, under such auspices, our Christmas Number hereafter will, doubtless, by a little refreshing variety, prove the falsity of the proverb that "Lady Common-Law must lie alone."—*Irish Law Times.*

We believe that unless some strong steps are taken to regulate the business in the Common Law courts, a crisis will soon occur which will entail the most inconvenient consequences. It is no doubt generally known that it is open to attorneys or solicitors to select the court in which to enter their cases: and it is not unnatural that there should be a tendency towards the strongest tribunal. By an almost unprecedented combination of circumstances, the popular choice and professional choice also has lately been driven upon the Court of Queen's Bench. Whilst the members of the other courts most famous for their judicial ability have been lost by death, or contemplate retirement, the Court of Queen's Bench has attained as high a reputation as it is possible for a court of law to acquire. The result is as we have stated, that the business is rapidly becoming too large to be dealt with satisfactorily. It has been mentioned to us that a firm of attorneys in the City, largely engaged in mercantile business, who, so long as Mr. Justice Willes sat in the Common Pleas, entered their cases in that court, have now commenced to transact their business in the Queen's Bench. But whilst remarking upon this fact, which no doubt is one instance out of several, it is only fair to say that there is at present little to justify the mistrust of the Judges upon whom some slur might be supposed to be cast by these remarks. As regards the Court of Common Pleas, it has been an unfortunate court. Within a short period it has lost two eminent lawyers particularly skilled in mercantile law—Mr. Justice Willes and Mr. Justice Montague Smith. It has also been unfortunate in being made the highway among which a coach-and-four was driven through an Act of Parliament to land Sir Robert Collier in the Privy Council. Furthermore, one of its vacant seats has been made available as a means of acknowledging scientific eminence and a large knowledge of a branch of law which, as a general rule, does not arise for discussion in the Court of Common Pleas. Therefore, although each individual member of the court may be distinguished for some high qualification, the court, *qua* court, is not calculated to inspire the confidence which is placed in a court more homogeneous in its nature. As regards the Court of Exchequer, it is sufficient to say that it is looked upon as in a condition of pending change, which may be realised at any moment, by the retirement of its ablest members. Our only object in mentioning these matters is to impress upon the heads of the law the importance of putting in force the powers which already exist in the statute book, and creating others, if necessary, to insure that the full judicial strength shall be brought to bear upon the business in whatever court it is to be found. The Act of 1870, relating to Judge's jurisdiction (33 & 34 Vict. c. 6), simply says that the chief of any court *may request* the aid of a puisne Judge of another court. Something more than this is required. Everything in short points to the advantage to be gained by adopting Lord Hatherley's project of one Supreme Court. We can see no possible objection to going step by step into the process of law reform, and there could be no better commencement than the merger of the common law courts.—*The Law Times.*

The recent violent death of Mr. Justice Willes has called attention to the tendency among the more successful lawyers to excessive work. To "die in the harness" may be a very heroic ambition, but to die when only a portion of the labor of life is done—in the prime of life and in the midst of success, is something that no one contemplates with pleasure. And yet a large class of our successful lawyers are daily preparing for such a "taking-off," by ignoring every rule for the conservation of the life forces. No matter how strong and vigorous the constitution, incessant labor will sap its forces and prostrate its powers "ere half the tale of life is told." There is no necessity for this. The life of a lawyer is not essentially an unhealthy one, but he is apt to make it so by making it too sedentary and sluggish. The lawyer who will take an occasional day in the fields with gun and dog or fishing-rod, who will walk and ride and row, and who devotes seven or eight hours to sleep, will have a fair prospect, work he never so hard, of crowning his labors with the silver whiteness of years.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

PACAUD v. MCEWAN.

Rescinding rule for new trial for nonpayment of costs.

The defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay the costs and the plaintiff obtained a rule *nisi* to rescind the rule for new trial. *Held*, that if the defendant should pay the costs of the trial, as provided by the original rule for new trial, and of this application within ten days, the rule *nisi* should be discharged, otherwise that the rule for new trial should be rescinded.

[Chambers, from Practice Court, 1872,—*Galt, J.*]

Burton, Q. C., obtained a rule calling upon the defendant to show cause why his rule for a new trial in this cause granted in Easter Term, 34 Vict., on payment of costs by the defendant, should not be rescinded on the ground that the defendant had made default in paying such costs. This rule was by consent of counsel enlarged to be argued in Chambers.

Osler shewed cause and called attention to the judgment of the Court of Queen's Bench, reported in 31 U. C. Q. B. 328, to show that the plaintiff was not under any circumstances entitled to recover more than nominal damages. The damages recovered were upwards of $800. It was admitted that he had no valid excuse to offer why the costs had not been paid; it was simply an oversight on part of defendant's attorney.

W. S. Smith supported this rule, citing *Grantham* v. *Powell* 1 P. R. 256; *Rabidon* v. *Harkin* 2 P. R. 129; *Van Every* v. *Drake* 3 P. R. 84; *Lyman* v. *Snarr* 3 P. R. 86.

GALT, J.—I should have been surprised to find that the decisions had so settled the practice in cases like the present that I should have been under the necessity of rescinding the rule for a new trial in this case and to have permitted the plaintiff to retain a verdict for a considerable sum of money, when the Court of Queen's Bench has decided that at the most he is entitled to nominal damages only. But on looking at the cases referred to by the learned counsel for the plaintiff I see that in every one of them the Court refused to rescind the original rule. Under the circumstances of this case I think the defendant should pay the costs of this application. I therefore order that upon the defendant paying the costs of the former trial, as provided by the original order for a new trial, and also the costs of this application, within ten days, that this rule shall be discharged, otherwise, that the same shall be made absolute.

COMMON LAW CHAMBERS.

ESCOTT v. ESCOTT.

Judge in Chambers—Setting aside final judgment—Filing affidavits on return of summons.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea.

Affidavits allowed to be read, though not filed when summons taken out; leave having been in fact given by the judge, but no notice thereof given to the opposite party.

[Chambers, 1872.—*Mr. Dalton.*]

Action against administrator on a note made by intestate. The plaintiff signed final judgment on default of plea. The defendant then applied to set aside this judgment on the merits, accounting for his laches.

O'Brien shewed cause. A judge in Chambers has no jurisdiction to set aside a final judgment, except when specially given him by statute, as in C. L. P. Act sec. 55: *Mearns* v. *G. T. R. Co.* 6 U. C. L. J. 62. See also *Ross* v. *Grange* 27 U. C. Q. B. 306 and C. S. U. C. c. 10. sec. 10. The application should be to stay proceedings: *Richmond* v. *Proctor* 3 U. C. L. J. 202. He also objected to certain affidavits being read as they were not filed when summons was taken out and no leave granted to file them on its return.

Keefer, contra.

MR. DALTON.—I shall allow the affidavits to be read as leave was substantially given to the defendant to file further affidavits on the return of the summons. The neglect to notice it in the summons is a mistake on the defendant's part, and if it rendered necessary an enlargement by the plaintiff, it would probably be at the defendant's expense, and on such other terms as would prevent injustice to the plaintiff; but, as no inconvenience has arisen in this case, I should disregard the omission, or allow an amendment if necessary.

I think a judge in chambers has power to set aside on the merits a final judgment signed on default of plea. As I think the defendant has shown grounds sufficient, I shall make the order, and provide that the plaintiff may go to trial at next assizes.

MOFFATT v. EVANS.

(Reported by MR. C. C. ROBINSON, *Student at Law.)*

34 Vict. cap. 12 sec. 12 (Ont.)—Service on Toronto Agent—Notice to plead.

A notice to plead when served on the Toronto Agent of a country attorney must demand a plea within ten days. A notice to plead which does not truly set out the time within which defendant must plead, before plaintiff can take his next step, is irregular.

The obscurity of the above enactment remarked upon.

[Chambers, Oct. 24, 1872.—*Mr. Dalton.*]

J. K. Kerr obtained a summons calling on the plaintiff, his attorney or agent, to shew cause why the notice to plead, served in this case, should not be set aside for irregularity, on the ground that the declaration and the notice to plead were served upon the Toronto agent of the defendant's attorney, and the defendant was therefore entitled to ten days to plead, instead of eight days, the time within which the notice served required the defendant to plead; and also to shew cause why the venue in this case should not be changed from the County of Wellington to the County of Halton.

Osler shewed cause. The summons as far as it relates to the notice to plead is grounded on 34 Vict. cap. 12, section 12 (Ont.) which reads as follows:—"In all cases where pleadings, or notices of trial, or countermand of notice of trial, in either of the Superior Courts of Common Law, or in the County Court, are served upon the agent of the attorney in the cause in Toronto, two clear additional days to the time now allowed by law for such service shall be allowed." Under this section it is not necessary in the notice to call upon defendants to plead within ten days. The statute does not apply to the form of the notice but merely to the time within which to plead. It is not enacted that ten days' notice is to be given, but that two days' time shall be added.

J. K. Kerr, contra. The section evidently means that two days are to be added to the time within which any pleading, &c., may be served, so as to avoid judgment by default. If the plaintiff were to give notice to plead in four days, it would clearly be irregular, and so as ten days are allowed, a notice only giving eight days is also irregular. The parties are entitled to a ten days notice, and this being only for eight days is irregular.

MR. DALTON.—The language of sec. 12 of 34 Vict. cap. 12, is singularly inappropriate for the purpose intended. Every one is aware that the intention of the clause, as to pleadings, was to give the opposing party two clear days further time for his answer to any pleading, where it is served on the agent of the attorney in the cause at Toronto, beyond the time to which he would be entitled, had it been served directly upon the attorney himself. It needs such knowledge indeed, however derived, to find in the language used that such is the enactment. The words are: "Two clear additional days to the time now allowed by law for such service shall be added." Allowed to whom? and for what? It cannot be to the party pleading. A year is allowed by law for a party to declare, and for the pleadings after the declaration there is no limit whatever. It would be absurd then to think that two additional days are given to that party; and there is no use or purpose which can be supposed for the two additional days, unless they be added to the time which the opponent has to answer. To him they must be understood to be *allowed* as added to the time within which the party pleading can compel an answer to that pleading. The association of pleadings with notice of trial and notice of countermand argues this. But pleadings only are mentioned in the clause, which do not necessarily include notices to plead, reply, rejoin, &c. That has arisen doubtless from the common practice of serving the notice to answer with the pleading itself, which, however, is not necessarily nor always so. Then assuming that the *pleading* must be *served* ten days before you can compel an answer, it does not follow that the notice will be always subject to the same rule, but it must be where the pleading and notice are served together, for if the above construction be right, an answer cannot be compelled till ten days after the service of the pleading.

I at first thought that a notice served on the agent might be in the usual form of eight days, though ten days must be allowed to elapse after the service, before judgment could be signed; but I cannot, on consideration, escape from the conclusion, that at least the whole time allowed by law must be mentioned in the notice. For why is any time mentioned at all, unless it be the true time; the only purpose is to give information; it may be more than the time allowed by law, the effect of which would be to give such further time, but it cannot regularly be less. The service on the agent is good service, and the time mentioned in the notice must be reckoned from the time of such service. No other commencement can be supposed, and therefore to require the opponent to answer in eight days is to take from him the time which the statute gives.

I think then that the word "allowed" in the clause is used in the sense that the two days are to be added to the time which the opposite party has to answer, and that where the notice to answer is served, as here, with the pleading on the Toronto agent, the notice must be to answer in ten days.

Summons absolute.

CHANCERY CHAMBERS.

(Reported by T. Langton, M.A., *Barrister-at-Law.)*

Carr v. Moffat.

Practice—Demurrer—Order to amend—Bill not amended—Revivor.

A plaintiff submitted to a demurrer and obtained an order to amend, by which he was required to make the amendments within fourteen days. This he failed to do, but took out *ex parte* and served an order of Revivor, the demurring defendant having died after the expiration of the fourteen days.

Held that by his failure to amend within the time limited, the Plaintiff's right to amend was gone, unless by a special application, he obtained an order enlarging the time.

That the Bill was not by such failure to amend, out of Court, without a further order, but it was open to the defendant to move to dismiss.

That the plaintiff was not warranted, without notice to the defendant, in taking any further step in the cause before making the amendments, for which, in the first place, the Bill was preserved, and he could not, therefore, issue an *ex parte* order of revivor.

An application to set aside an order to revive for irregularity, is properly intituled in the abated suit, but if it be made upon any other ground the style of the cause as revived should be used.

An application to set aside an order of revivor should be made to the Court and not in Chambers.

Nicholson. v. *Peile*, 2 *Beav.* 497 not followed.

[January 4th, 1873 — *V. C. Blake*, on Appeal from Referee.]

On the 19th December 1872, an application was made to Mr. Holmested, the Referee in Chancery Chambers, by *Foster*, to set aside an order of revivor as irregular under the circumstances which appear in the judgment of V. C. Blake.

Foster cited *Hoflick* v. *Reynolds*, 30 L.J. (Chy.) 407, 9 W.R. 431. *Vernon* v. *Vernon*, 6 Chy. App. 833. *McMurray* v. *G. T. R.*, 3 Chy. Cham. 306.

Hodgins, contra, cited *Deeks* v. *Stanhope*, 1 Jur. N.S. 413; *Ward* v. *Cartwright*, 17 Jur. 781, 10 Ha. App. 73, and *Tarleton* v. *Barnes*, 2 Keen 632.

The Referee then refused the order asked. He thought that he was concluded by the decision of the late Referee in *Bell* v. *Cameron*, (5th Sept. 1872). There a demurrer was submitted to, and an order to amend taken out; the plaintiff did not amend under it, but took out another order after the time for amending under the former one had expired. This was moved against, and Mr. Taylor, the late Referee, then held that the Bill was not out of Court, and it was competent to the plaintiff to take out as many orders as he pleased, subject to the interference of the Court, to prevent abuse of its process. The present application being made in the abated suit, objection was taken to the style of cause. Mr. Holmested was of the opinion that an order of revivor was *de facto* good, and even proceedings to discharge it should be styled in accordance with it. He also doubted whether under order 339 the application should not be made to the Court, even though the ground laid was irregularity, but upon the main grounds he refused the order.

Against this decision the defendant appealed. The case was argued by the same counsel, and judgment was delivered by :—

V. C. Blake.—This is an appeal from an order of the Referee in Chambers refusing an application of Alexander Moffatt the younger, to discharge an order whereby this suit was revived against him and William Moffatt as defendants. It appears that the Bill was filed against Alexander Moffatt on the 15th Nov. 1871; a demurrer to this bill was filed on the 4th March 1872, an order to amend was taken out on the 13th of the same month, the defendant died on the 8th April following, and on the 2nd of December last, the cause was revived against W. Moffatt and Alex. Moffatt the younger as representing the original defendant. This order was served on Alex. Moffatt the younger on the 6th Dec., the motion to discharge the same was served on the 16th, and an order was made by the Referee refusing this application on the 19th of the same month.

The applicant asks for the discharge of the order to revive on two grounds; 1st, because at the time of the granting of this order the cause was out of Court as the plaintiff had not amended pursuant to the order to amend; and 2nd, because, even if the cause were in Court, the plaintiff was not in a position to take such a step *ex parte*, as the reviving the suit. The order to amend taken out reads as follows: "upon the application of the plaintiff it is "ordered that he be at liberty to amend his bill "of complaint in this cause as he may be advised "without costs, amending the defendant's office "copy thereof, submitting to the demurrer of the "defendant herein and paying to him four dollars "for his costs hereof, and making such amend-"ments within fourteen days from this date." Looking at the form of this order, it cannot be successfully contended under the authorities that the Bill is without further order gone. It would certainly be necessary to procure an order based upon the non-fulfilment of the terms of the order to amend before the bill could be considered out of Court, and as this has not been done, I think the first ground of exception cannot succeed. As to the second

point, my impression at the hearing of the motion was, and after further consideration, still remains, that the plaintiff submitting to a demurrer and obtaining leave to amend, is bound within fourteen days to act under the order, or else his right to amend is gone. He is bound either to amend within fourteen days, or to make an application to extend the time for such amendment; but failing this, the defendant can move to dismiss. From the cases of *Armitsted* v. *Durham*, 11 Beav. 428 and *Bainbrigge* v. *Baddeley*, 12 Beav. 152, it is clear that where an order to amend issues without limiting the time when such amendment is to be made, whether the order issue before or after answer, or demurrer upon an ordinary or special application, the Bill must under such order be amended within fourteen days, this being so when the defendant pleads in such a way as that the plaintiff is obliged to admit his bill is defective, and the Court allows him to make a better case by his pleading. I do not think it is unreasonable to say that unless the necessary amendments be made within fourteen days, or by special application, the time for amendment be enlarged, the bill shall stand dismissed. It is true there are two cases, *Nicholson* v. *Peile*, 2 Beav. 497, and *Deeks* v. *Stanhope*, 1 Jur. N. S. 413 which go to shew that before answer and after demurrer submitted to, and leave to amend given, the plaintiff can issue as many orders to amend as he pleases, the result being that a plaintiff can continue to issue orders to amend and delay the proceedings until the defendant, by a special application, procures from the Court, some order limiting the time within which such amendment is to be made. But it is to be observed that Lord Langdale who gave judgment in the three cases cited from Beaven, says in disposing of *Bainbrigge* v. *Baddeley*, "I certainly was of opinion that if upon the "allowance of a demurrer, more than ordinary "time to amend was required, it ought to be "asked for, the plaintiff might either have "applied specially to extend the time, or for a "special order to amend, but the order of "course was irregular." The force of *Nicholson* v. *Peile* is thus weakened, as it is also by the case of *Vernon* v. *Vernon*, 6 Chy. App. 833, where it is cited but not followed. In *Hoflick* v. *Reynolds*, 9 W. R. 431, V. C. Kindersley after referring to two of the Registrars and two of the Clerks in Court said, "the view they had "taken appeared to be the sound one, and it "was this, when the order for leave to amend "was obtained that had the effect of getting "rid of the Bill as it then stood, and unless the "plaintiff amended within the time pre-"scribed by the order, the bill was gone." In *Vernon* v. *Vernon*, a demurrer having been filed to a bill the plaintiff in due time served an order of course for leave to amend. Two days before the expiration of the time for amending, he served a summons for further time to amend, returnable the day after such expiration, which application was refused by V. C. Bacon. The plaintiff appealed to the Lords Justices from this decision and it was upheld. There the Court could have granted the request of the plaintiff either by extending the time under the order already made, or by issuing a fresh order to amend, and if the Court approved of *Nicholson* v. *Peile*, the latter course would have been followed, but in place of that, the Court of Appeals virtually over-rules that decision. I think therefore, that I am justified by the authorities, as they stand at present, in the conclusion that under the circumstances of this case apart from the peculiar terms of the order to amend, that the plaintiff was bound to amend within fourteen days from the date of the order, and that after the expiration of that time, the plaintiff was put to make a special application to the Court for any indulgence he might think himself entitled to. I think therefore, he was not justified in taking out an *ex parte* order to revive, but that not having taken advantage of the order to amend within fourteen days, he was put to make a special application to Court for an order to revive. The bill was preserved for one specific purpose, and a specified time was appointed for carrying that out; the plaintiff accepted these terms, and it is not for him to say further time must be given, and the suit kept alive for all the purposes I desire, and I will proceed without calling upon the defendant to shew cause. If my view of the practice be correct, as against the original defendant at the time of his death, the plaintiff could not have taken any step except by a special application, and I cannot see that the death of the defendant can place the plaintiff in any better position in this respect. But the terms of the order in this case put another difficulty in the plaintiff's way. It gives him liberty to amend on certain terms, amongst which are submitting to the demurrer, and making the amendments within fourteen days. These are the conditions upon which the indulgence asked for is granted. He is to be at liberty to amend, if he submit to the demurrer, and if he amend within fourteen days. Now, under Order 196, where a person obtains an order upon condition, and fails to comply with the condition, he is considered

to have abandoned the order so far as the same is beneficial to himself, and any party interested may take such proceedings as the order may in such case warrant, or as might have been taken if the order had not been made. Here the condition was not complied with, and I do not think the plaintiff can by an *ex parte* order revive the litigation, but I am of opinion he must make a special application for such order, as under the circumstances the Court may consider him entitled to. On the part of the plaintiff, it was argued that in any event this application cannot succeed, because the notice of motion is styled in the original cause, and not in the cause as revived. I think the plaintiff might have used the style as revived. Order 338 says, "an office copy of the order is "to be served upon the party or parties who "would be defendant or defendants to a bill of "revivor, or supplemental bill according to the "former practice of the Court, and such order "shall from the time of service, be binding up- "on such parties." The persons added seem from the first to be looked upon as parties. The order to revive is a conditional one to go absolutely into effect, unless cause be shewn. The persons added are to be treated and named as parties from the time the order names them, unless they take proceedings to have their names struck out. The practice under the similar Order in England shews that this view is correct, for it treats such a case as the present (a motion to discharge the order to revive for irregularity), as an exception to what would be the ordinary rule as to the style of the cause. In 2 Dan. Chy. Pr. 1389 (5th ed.) the rule is laid down as follows, "If the order is sought to "be discharged on the ground of irregularity, "the notice of motion is properly entitled in "the abated suit only," citing *Stratford* v. *Baker*, L. R. 4 Eq. 256, which is an authority that supports this statement. As the present application is one to discharge for irregularity the order to revive, it comes within the above exception, and therefore the plaintiff was justified in using the style he did. On the part of the plaintiff, it was further urged that the application should have been made to the Court, and the Referee has no jurisdiction. Upon this objection, I think the plaintiff is entitled to succeed. The order to revive under the present practice takes the place of the order formerly made, not in Chambers, but in Court. The person served is to be at liberty to apply to the "Court" for the discharge of the order. The questions arising in cases of abatement are oftentimes quite as difficult of solution as those occurring in the Master's office, where parties are added. In the latter case, the Master exercises his discretion, and from his order the appeal must be to the Court In the former case, the Clerk of Records and Writs grants the order, and I do not think unless express power is given by the orders of the Court, or the practice warrants it, that such an application as the present can be made, except in Court. No authority was cited on this point in support of this application, and I have not been able to find any. Under the act appointing the Referee his power in Chambers is restricted, and he has no authority "in matters relating to appeals and applications in the nature of appeals." I think the present motion comes within the exception, and that the Referee has not the power to review what the Clerk of Records and Writs has done in this case, and therefore on this ground, that the order of the Referee should stand, and the present application be refused. I was asked not to charge the applicants with the costs of these motions. In every matter I think the costs should follow the event, unless some very good cause for a different result be shewn. I cannot say here that this has been done. There is no sufficient reason for charging the plaintiff with his costs of a motion in which he has succeeded, and I think he should have them against the defendant who moves.

Order affirmed.

Fullerton v. Keely.

Gen. Orders 434 and 435—Infants—Decree in Chambers—Setting down.

In suits for foreclosure or sale, motion for a decree is to be made in Chambers under Order 434, only when infants alone are concerned. If there be also adult defendants, the case should be regularly set down for hearing before the Court.

[January 20, 1873.—*Mr. Holmested.*]

Fleming applied in chambers for a decree under Order 434. Besides the infants there were adult defendants against whom the bill had been taken *pro confesso*.

The Referee.—This is an application which it is not within my jurisdiction to entertain. A case of *Lloyd* v. *Burke*, which was very similar to the present in its facts, was set down (29 Nov. 1872) by way of motion for decree, and His Lordship Vice Chancellor Strong held that it was properly so set down. He pointed out that Gen. Order 435 empowers the Registrar to issue a decree against adult defendants, under certain circumstances, but gives him no jurisdiction where infants are concerned. Such jurisdiction is given to the Referee in Chambers by Gen.

Order 434, but the terms of this order are such as to give him no power to make a decree against adults. So that in a case like the present where the combined action of the Registrar and the Referee would be necessary, the proper course would be to set the cause down on motion to the Court. [This course was afterwards followed.]

MASTER'S OFFICE.

(*Reported by* T. LANGTON, M.A., *Barrister-at-Law.*)

KEIM v. YEAGLEY.

Practice—Taxation—Revision of Bills taxed by Local Masters—Powers of Taxing Officer at Toronto—Evidence.

The Taxing Officer on revision of bills of costs taxed by a Local Master has power under Gen. Orders 311 and 312 not only to strike out items improperly allowed but also to restore items improperly struck out and generally to review the taxation.

Evidence cannot be received by a Taxing Officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction.

[Master's Office, January 14th, 1873.—*Mr. Taylor.*]

This was an appeal from the decision of the Taxing Officer.

C. Moss for plaintiff.

W. Cassels for defendants.

MASTER TAYLOR—It seems to me that the power of the taxing officer over bills of costs before him under Gen. Orders 311 and 312 is not limited to striking off items which he may find have been improperly allowed. It is that in the Order of February, 1865, the reason for passing the Order now in force as to the revision of taxation is said to be that the Judges have observed in bills of costs, numerous items allowed by Local Masters which are not warranted by the tariff, "and also that Order 312 directs the taxing officer to mark in the margin, such sums "(if any) as may appear to him to have been improperly allowed or to be questionable, and "this is relied on here as an argument that the "taxing officer cannot restore any items taken "off by the Local Master, but can only strike "off items which he has improperly allowed. The order, however, goes further and says the taxing officer is to revise the taxation. Now the definition of the word revise as given in the Imperial Dictionary is, "To review, alter and "amend," so that the direction to revise the taxation is wide enough to cover what has been done by the taxing officer here. The provision for giving notice to the Toronto agent in all cases where the taxation is not clearly erroneous is one applying equally where the alteration intended to be made is by striking off or by restoring. The other question is whether the taxing officer should have received evidence to show that the defendant is not entitled to the items in respect of which the contention has arisen. The plaintiff desires to show that the order changing the venue was obtained by the defendant for his own convenience and under an arrangement with the plaintiff that such order should be obtained at the defendant's own expense. Would such evidence have been admissible before the Local Master? I incline to think it would not. The order is one obtained by the defendant on consent of the plaintiff and is silent as to the costs. This being the case under the third rule laid down in 1 S. & S. 357, the costs of both parties became costs in the cause, and the plaintiff having dismissed his own bill with costs, the defendant gets the costs of the cause and is entitled to the costs of the order. The Master could not, it seems to me, receive any evidence to show that the defendant is not entitled to costs which the order considered according to the long established practice of the Court gives him. Had it been intended that the defendant should not in any event have the costs, the order should have been so expressed. The order is on the face of it a consent one, and this is another difficulty in the way of any change or variation being now made in it. In connection with the first point disposed of, namely, the extent of the Taxing Officer's powers on a revision of taxation, it is worthy of observation that at the time the orders of February, 1865, were passed there was an order in force (28th April, 1862) made, under which any person against whom costs had been taxed by a Local Master could obtain an order of course for retaxation in Toronto. This order has not been in force since the Consolidation of the General Orders in June, 1868. On a taxation under that order the whole bill was opened before the Taxing Officer. Orders 311 and 312 in fact require that every bill of costs taxed by a Local Master shall undergo that scrutiny by an officer of the Court in Toronto to which formerly only particular bills were subjected on the application of a party aggrieved. Where a party feels aggrieved by the improper reduction of his bill of costs by a Local Master he has no redress except by the expensive proceeding of a special petition to the Court unless he can obtain, as I think he can, redress under Order 312. To hold that he can do so when the bill is before the Taxing Master for review is, it seems to me, more consonant with the principles which govern as to proceedings in the Court, than to hold that he must resort to the expensive mode of proceeding by a special petition.

NOVA SCOTIA.

SUPREME COURT.

Bowen and Wife v. Shears.

Trespass to land—Statute of limitations—Adverse possession—Estoppel.

In 1831, C. gave plaintiff's wife a piece of land, part of a farm. In 1833 the plaintiffs went into actual possession, C. helping them to build the house, and so continued until 1870, when defendant entered. Plaintiffs brought trespass, and defendant set up title in himself under the will of C. (made in 1859), by which the farm, "then owned and occupied by the testator," was devised to the defendant. In 1838 the plaintiffs conveyed to C. in trust, to preserve the right title and interest of plaintiff's wife for their daughter, free from the father's debts, &c., the rents and profits to the wife during her life, and after her death for the support and maintenance of the daughter. By this deed C. had power to call for and receive the rents and profits. Before his death C. recognized in a survey he made the fact that he had given the land in dispute to plaintiff's wife.

Held that although the plaintiffs were estopped by the deed made in 1838 from claiming title by possession before that time, they were entitled so to claim, being in effect, a tenant at will, after the lapse of one year from that date; and the plaintiffs could maintain their action against defendant as a wrongdoer, having held adversely to him for more than twenty years.

Trespass by Bowen and wife against Philip Shears. At the trial of the cause a verdict was taken by consent for the plaintiffs for $4.00—damages subject to the opinion of the Court on the whole case with all the powers that could be exercised by a jury, and power also to set aside the verdict or give judgment in accordance with it, or to order a nonsuit or judgment for defendant.

The facts of the case as proved at the trial were substantially as follows: The plaintiffs were married in 1831, and the day after the marriage Philip Cheppard, the godfather of the plaintiff Mary Ann Bowen and for whom she had previously worked, took her to the piece of land now in dispute, and said, "I am going to give you this." It was then called pasture and had a fence round it. He divided the land between her and her brother, the present defendant, giving to her one half, between five and six acres. In 1833 the plaintiffs went into possession of the land thus made over to the wife Mary Ann, and continued in quiet possession of it until the trespass complained of by the defendant in April 1870, showing a continuous possession of thirty-seven years. The plaintiff Edward Bowen built a house on the land, urged to do so by Cheppard, who helped him to build the cellar, and the plaintiffs went into the house in 1834, and occupied it from that time until five years before the trial, when they rented it at £9 a year. The defendant Shears helped to shingle the house, and two years afterwards assisted to erect the barn, and since then there has been a fence round the property and the whole now under cultivation. The trespass by the defendant was proved. His defence under his plea was title in himself. This he claimed under the will of Philip Cheppard, who, by a will dated 29 Nov. 1859, devised to him all the farm lot that the testator then owned and occupied containing about 400 acres with the buildings, &c., excepting out of the said devise, about 2½ acres. To hold to the said defendant the said lot and premises during his natural life, and after his decease to his daughter Mary Shears in fee simple. When the testator made his will he had been out of that part of the property claimed by the defendant under the devise to him of the 400 acres for a period of 28 or 29 years, unless, under the conveyances to which hereafter referred to, he became revested of the property given to the plaintiff's wife in 1831. This deed, dated 26th Oct. 1838, was proved on the part of the defence to be between the plaintiffs on the one part, and Philip Shears on the other. It recited, that "Whereas Philip Cheppard has allowed Edward Bowen to erect a dwelling house and barn on a piece of land belonging to him, and whereas the said Edward Bowen and Mary Ann his wife are anxious that the said premises should be conveyed to the said Philip Cheppard in trust for the benefit of Eliza Jane Bowen: they, the said Edward Bowen and Mary Ann his wife for divers good causes, &c., and in further consideration of the sum of ten shillings, &c., granted, bargained, &c., to the said Philip Cheppard, his heirs and assigns, all the estate right title and interest whatever of the said Edward Bowen and Mary Ann Bowen both at law and in equity of, in to or upon the said premises. To have and to hold to the said Philip Cheppard his heirs, &c., but to for and upon the uses and trusts to be specified and declared by a certain Indenture of even date therewith and thereto annexed. The deed also assigned to Philip Cheppard certain personal property to and upon the same uses and trusts as are mentioned in the conveyance already referred to. That conveyance commenced with stating "that the right title and interest of the said Mary Ann Bowen in the house and barn erected on the land belonging to the said Philip Cheppard, shall be preserved for Eliza Jane Bowen, daughter of the said Edward and Mary Ann Bowen, exempt from any liability of the debts,

&c., of the said Edward Bowen." Then follows a covenant between the present plaintiffs and Philip Cheppard that he shall have full power and authority to call for and receive the rents and profits of the said house and barn, and then a further covenant on the part of Philip Cheppard acknowledging, testifying, and declaring that the uses and trusts upon which the first conveyance was executed were and are that the said house and barn and all rents and profits arising therefrom shall be paid to the said Mary Ann Bowen during her lifetime, and independent of her said husband, and after her death be applied towards the maintenance and support of the said Eliza Jane Bowen, &c.

Dodd, J.—Whatever claims or title plaintiff, have under the gift of Cheppard to Mary Ann Bowen in 1831, they are estopped from setting it up by their deed to him in October 1838. But from that time to the trespass complained of, they have been in the undisputed possession of the property enclosed by a stone and wood ence, and recognized by Cheppard at a survey of his land by Campbell, who when they came to the 5 acre lot, did not include it in the survey, Cheppard telling the Surveyor that was the lot he had given to Mary Ann Bowen; when Cheppard died not appear, and under the devise in his will to the defendant, the latter did not attempt to dispute the possession of the plaintiffs until April, 1870. The deed of 1838 to Cheppard, from the plaintiffs, made them tenants at will, and at the expiration of one year from that date, the possession become adverse. The first section of the Act of 1866 enacts that no land or rent can be recovered, but within twenty years after the right of action accrued to the claimant, or some person whose estate he claims. By sec. 3, in the case of a tenant at will, the right shall be deemed to have accrued at the end of one year from its commencement. The right in this case under the statute for Cheppard to recover the land commenced in October 1839, and in October 1859 he would be excluded from recovering or maintaining the action, and the defendant who claims through him, cannot be in a better position. The plaintiffs have held adversely against this testator and the defendant over thirty-one years. The Act 3 & 4 Will. IV. c. 27, the provisions of which are similar to the Provincial Act of 1866, sections 2 & 3, has done away with the doctrine of non-adverse possession, and the question now is whether twenty years have elapsed since the right accrued, whatever the nature of the possession. Except in the cases mentioned in sec. 15 of the Act, which do not apply to the case under consideration, the effect of the Act is not merely to bar the remedy, but to bind and transfer the estate, *Scott* v., 3 Dan. & War, 388, *Nepean* v. *Doe*, 2, M. & W. 894, *Cullen* v. *Doe* 11 Ad. & E. 1008. The possession in this case is ample to maintain the action against the defendant, who is a wrong-doer. I therefore think the verdict for the plaintiff, taken by consent, for $4, should remain, and that the plaintiffs should have the costs of the argument.

IRISH REPORTS.

COURT OF COMMON PLEAS.

Loughnan v. Barry and Byrne.

June 3, 4, 24, 1872.—*Sale of Goods—Fraudulent misrepresentation—Payment by unproductive cheque—Rescision of contract—Trover—Money had and received.*

It is not necessary that a fraud by the vendee of chattels should be indictable, in order to entitle the vendor to rescind the contract of sale by reason thereof.

The drawing and giving of a cheque upon a bank, in payment, amounts to an implied representation that the drawer has authority to draw upon the bank, against assets *eo instanti* applicable towards payment.

The giving of an unproductive cheque in payment, on a sale of chattels for ready money, by a vendee, then knowing there are no assets in bank against which he has authority to draw, at the time of the cheque being taken by the vendor upon the faith that there are immediate funds applicable towards payment, amounts to a fraudulent misrepresentation by the vendee; and such misrepresentation will entitle the vendor to rescind the contract and resume the goods, notwithstanding that the vendee, upon reasonable grounds believes, at the time, that there would be funds in bank to pay the cheque when presented, and though he were not indictable for obtaining the goods by false pretences.

[C. P.—Ir. L. T. Rep. Dec. 21, 1872, p. 186.]

This was an action of trover, and for money had and received. The facts, as proved at a former trial, have been already reported, 5 Ir. L. T. R. 189. A new trial was had at the sittings after Michaelmas Term, 1871. Substantially the same facts then appeared, which, for the purposes of this report, are sufficiently set forth in the judgment (*infra* p. 64) of the Lord Chief Justice. At the close of the plaintiff's case, *Heron*, Q.C. (with him *Hemphill*, Q.C., and *Martin*), on behalf of the defendant, asked his lordship for a non-suit, or to leave to the jury the questions: 1. Did Neill intend to cheat? 2. Did he believe the cheque would be paid? Referring to the above report, and to *R.* v. *Walne*, 11 c. c. c. 647 there cited, they contended that the question of Neill's intention should be considered by the jury. That so, where the question is whether a

person quitting his house thereby commits an act of bankruptcy, his intention in quitting is to be considered.* That the question of Neill's intention to pay should also be left to the jury; *Hawse* v. *Crowe*, R. & M. 414. And that, in order to vitiate the contract, the facts must have amounted to the offence of obtaining the goods by false pretences; referring to *Noble* v. *Adams*, 2 March, 370; Holt 251, where it is said, "unless the representations amounted to the offence of obtaining goods by false pretences, we cannot take upon ourselves to say that the contract was altogether void,"† *Armstrong*, Sergeant (with him *Monahan*, Q.C., and *H. H. Macdermot*), *contra*, submitted that the first question was objectionable, as involving mixed matters of law and fact, and that the second was *dehors* the question at issue; relying on the decision of the Court above *Loughnan* v. *Berry*, 5 Ir. L. T. R. 189, and referring to the notes thereto. His Lordship declined to non-suit, or to leave to the jury the question specified. The defendants having accordingly gone into evidence, at the close, *Hemphill*, Q.C., asked his Lordship to leave to the jury the questions:—1. When Neill gave the cheque, did he believe it would be duly honoured on the following day? 2. Did he give the cheque with any intention to defraud the plaintiff?

MONAHAN, C. J.—I cannot do so. At the furthest, I could only ask had he reasonable grounds for believing that the cheque would be honoured. The second question is unnecessary. I am clearly of opinion that there may be a misrepresentation such as would render the contract voidable, although the facts do not amount to the offence of obtaining the goods under false pretences.

Hemphill, Q.C., asked for a direction that, in case the jury believed that Neill gave the cheque without any intention to defraud, and believing that it would be honoured on the following day, they should find for the defendants: *Bristol* v. *Winsmore*, 1 B. & C. 514. Also, for a direction on the money count, as there was no privity between the plaintiff and defendants: *Baron* v. *Husband*, 4 B. & Ad. 612; and upon the ground, that as the defendants would have had no right to keep the money if demanded by Neill on April 14th, unless Neill owed them money, the defendants were entitled to retain the moneys of their debtor on that day. And further, that, the plaintiff having done no act to disaffirm the sale to Neill before the re-sale of the cattle, the defendants were entitled to a verdict, even though the goods were obtained by fraud on the part of Neill: *Kingsford* v. *Merry*, 11 Ex. 577, 1 H. & N. 503.

MONAHAN, C. J.—I must decline to direct as required. There may be legal fraud, without an intention to defraud. I think that ordinarily, and having regard to the course of mercantile dealings, a person who, knowing that there are no funds to meet it, gives a cheque to another, who takes it believing that there are such funds, thereby impliedly represents and undertakes that there then are funds to meet it in the bank on which it was drawn. If its payment is to be deferred, or to depend upon a contingency, the person giving the cheque ought to mention that at the time.

His Lordship having charged the jury, left to them the following questions:—

1. When Neill gave the cheque to the plaintiff, did he in effect convey to him that that there were funds in the bank to meet the amount thereof, knowing that there were not funds to meet it; and did the plaintiff take the cheque, believing that there were funds in bank to pay the same, on the faith of such representation?

2. At the time of giving the cheque, had Neill a reasonable ground for believing, and did he in fact believe that there would be funds in the bank to pay same when presented?

3. When the defendants sold the cattle, were they aware of the circumstances under which Neill had bought the cattle, and that the cheque was passed by him by the way of payment therefor, and that there were no funds for the payment thereof except the proceeds of the sale of the cattle by the defendants?

The jury having answered these questions respectively in the affirmative, counsel for the defendants called upon his Lordship to direct a verdict for them upon the second finding, which the learned Judge declined to do; but, on the requisition of the plaintiff's counsel, directed a verdict for the plaintiff, reserving leave, by con-

*See *Fowler* v. *Padgett*, 7 T. R. 509.—REP.

† The judgment of the Court was delivered by Gibbs, C. J., "one of the most learned and acute judges that ever sat in Westminster Hall" (*per* Lord Tenterden, 2 B. & Ad. 697). The expressions in the text do not occur in the report given in 7 Taunt. 58 (misquoted in Chitty, Cont. 9th, Ed. 379), but appear in the reports of Marshall and of Holt ("a book of no authority," *per* Lee, C. J., 1 Wils. 15). But, whatever the value of the latter reporters, their concurrence is demonstrative of accuracy in this particular case (*cf.*, *per* Lord Mansfield, Cowp. 16); and their reports of it are abundantly confirmed by *Irving* v. *Motley*, 7 Bing. 543. In the latter case, however, Park, J., materially qualifies the inference to which *Nobles* v. *Adams* might have given rise. See also, Benjamin on Sales, 323. With respect to *Irving* v. *Motley*, it may be noted that the report in 5 M. & P. 393 omits a *dictum*, of Tindal, C. J., which appears in Bing.—REP.

sent, for the defendants to move to have the verdict set aside and a verdict entered for them, if the Court should be of opinion that a verdict should have been so directed.

A conditional order having been obtained, "that the verdict had for the plaintiff be set aside, and a verdict entered for the defendants, pursuant to leave reserved, or that said verdict be set aside and a new trial granted on the ground of misdirection."

Monahan, Q.C., (with him *H. H. Macdermot*), on behalf of the plaintiff, showed cause. The doctrine of *Kingsford* v. *Merry*, 1 H. & N. 503, 11 Ex. 577, does not protect the defendants, for firstly, they were not purchasers or innocent transferees, but the salemasters of Neill; and secondly, they had full notice and knowledge of the transaction with him. A cheque is an order for the payment of money: and its nature assumes that there is cash in bank to meet it on the moment of its being passed: *Lockett's Case*, Leach C. C. 94, 6 T. R. 567, n., 2 E. P. C. 940; 2 Russ. on Cr., 4th ed., 640, n. a. The passing of it, therefore, is equivalent to a representation of there being immediate funds at the bank applicable to its payment: *R.* v. *Parker*, 8 C. & P. 831; *R.* v. *Jackson*, 3 Comp. 370. On the first finding, Neill was guilty of legal fraud; and the second finding is not inconsistent, even if upon it he would not have been guilty of criminal fraud.* But even in a criminal point of view, the offence of obtaining goods by false pretences might exist without an intention in fact to defraud: *Re Naylor*, L. R. 1 C. C. R. 4. [MORRIS, J.—Is there any statement there, that Naylor had reasonable grounds for believing that Moss would take the goods?] None; but the jury find that, at the time of the pretence, Naylor intended to pay for the goods. That case shows that a pre-conceived design to get the goods without payment was unnecessary. The contrary was contended for on the former argument of this case. There is only a short report in the Irish Reports, but the arguments are fully and accurately stated in 5 Ir. L. T. Reports, 189. [MORRIS, J.—In the absence of any conversation or statement to the contrary at the time of a sale, it appears to me that the giving of a cheque in payment would be equivalent to a ready-money transaction. But the purchaser could not be indicted, if he had reasonable grounds for believing that it would be met.†] The transaction was a ready-money one, and there is no evidence that the cheque was taken otherwise than as ready money. Fraud may vitiate a sale, though it do not amount to a criminal offence. Falsehood in fact, going to the substance of the consideration, gives a right to rescind the contract: *Reese River Co.* v. *Smith*, L. R. 4 E. & Ir. App., 79. [MORRIS, J.—Suppose that Neill had himself retained the cattle, would the plaintiff be justified in retaking them from him? My present impression is that he would*]. Neill would have had no answer to an action of trover.† The defendants were Neill's agents, and as such liable: *Perkins* v. *Smith*,‡ 1 Wils. 328. Not being innocent transferees without notice, they are not entitled to protection: *Irving* v. *Motley*, 7 Bing. 543. The sale to Neill being vitiated by fraud, no property passed: *Noble* v. *Adams*, 7 Taunt. 59; and the defendants, having got possession of the goods and the proceeds, are liable to the true owner in trover and for money had and received:§ *Hill* v. *Perrott*, 3 Taunt. 274; *Abbotts* v. *Barry*, 5 Moore 98, 2 Br. & B. 369. It is not necessary to show that an action of deceit would lie against

* So, see *Foster* v. *Charles*, 7 Bing. 105. See note, 5 Ir. L. T. R., 191.—REP.

† In a recent case in Australia, a prisoner was indicted for obtaining money by a false pretense that a cheque was good and available, and would be paid when presented at the bank. It was post-dated and crossed; but was not presented through a banker; and before the day of post-date, the traverser was arrested, and thereby, as contended, prevented from earning money to meet it. He had previously had an account in the bank, but only a nominal sum remained to his credit. *R.* v. *Parker*, 2 Moo. C. C., 1, was cited. Held, that there was an existing false pretense, *i.e.*, that the cheque was a good one: —"It was not necessary to accompany the cheque by a guarantee of the solvency of the drawer, or to the effect that money would be at the bank to meet it. A cheque represented money, and bore on the face of it an implied statement that the drawer had authority to draw upon the bank—that he had funds at the bank, a portion of which he could withdraw. A post-dated cheque [see *Watson* v. *Poulson*, 15 Jur. 1111—*R.*] in this respect differed in no way from one dated the day it was given. The question then was, when the prisoner gave this cheque, had he any funds to meet it, or had he any reasonable expectation of having funds:" *R.* v. *Bathurst*, 1 A. J. R., 40.—REP.

* A having bought goods from B, with a pre-conceived design not to pay, but with a view of obtaining money on them by giving a bill of sale; and having misrepresented his ability to pay: Held, that B was justified in rescinding the contract and re-taking the goods: *Dixon* v. *Heweston*, 16 L. T. N. S., 295. See *Gillard* v. *Brittain*, 8 M. & W., 575; *Clough* v. *L. & N. W. Ry.*, L. R. 7, Ex. 34; *Nickling* v. *Heaps*, 21 L. T., N. S. 754; *Harvey* v. *Mayne*, 6 Ir. L. T. R. 130, and notes thereto.—REP.

† If the facts amounted to felony, see *Walls* v. *Abraham*, L. R. 7 Q. B. 554, 41 L. J., Q. B. 306, 26 L. T., N. S. 433; *Desborough* v. *Homes*, 1 F. & F. 6.—REP.

‡ See *Fowler* v. *Hollins*, L. R. 7 Q. B. 616.—REP.

§ See *British* v. *Amer. Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 122; and note to 5 Ir. L. T. R. 192.—REP.

Neill. The intention to defraud is a more essential element in deceit.* But in contract, by reason of the false representation, that which was contracted for not being acquired, there is in effect no contract: Kerr on Fraud, 17. So here, that which was in fact given to the plaintiff differed in the substance from what he was entitled to receive: *Gompertz* v. *Bartlett*, 2 E. & B. 849. And therefore, even if deceit would not lie, the sale would be void: *Polhill* v. *Walter*,† 3 B. & Ad. 114; *Milne* v. *Marwood*, 15 C. B. 778. No matter how reasonable may have been Neill's expectation of funds, according to the second finding, that does not acquit him of the misrepresentation with which he stands charged by the first finding. The last finding establishes that the defendants are not in the position of innocent third persons. But, even if one or two innocent persons must suffer, it should be he who provided the means by which a wrong was compassed.‡

Hemphill, Q.C., (with him *Martin*,) for the defendants, contra. On the second finding, a verdict should be entered for the defendants. We have now had new evidence as to the dealings between Neill and the Royal Bank; and it appears that the bank frequently met his overdrafts, exceeding the defendants' guarantee. [MONAHAN, C. J.—It was not suggested, at the trial, that the bank of itself would pay this cheque. No question was left to the jury as to that.] It shows that Neill was not criminally liable. He went to the fair with some hundreds of pounds in cash, to purchase cattle. He bought those cattle (amongst others), intending to pay for same, and appointing a place and time to do so. That was a complete sale, a sale upon credit. The sale transferred the property, and the right of property carried with it the right of possession. Before the time for payment had arrived, the possession was vested in the vendee by delivery of the cattle under the contract. The lien of the vendor was at an end, and his right of stoppage *in transitu* determined; nothing remained but his right to recover the price on foot of the contract: *Dixon* v. *Yates*, 5 B. & Ad. 313. The plaintiff could not then have re-taken the cattle, and he was bound by the terms of the credit he had given. Subsequently at one o'clock, as appointed, the parties met for payment, and the plaintiff, without question, accepted 30s. earnest and a cheque for the residue of the purchase money, and a cheque which could not possibly be presented and cashed on that day. [MONAHAN, C. J.—The plaintiff being to be paid in cash, could he have rejected the cheque when tendered, and have re-taken the cattle? LAWSON, J.—The cattle had not been delivered to Neill then.] Whether the plaintiff could have resumed possession, depends on whether the bargain and sale had been completed, the property divested, and the transitus at an end. If the transaction, in its inception, had been vitiated by fraud, and possession had not been given up, the vendee would not have been discharged:* *Owenson* v. *Morse*, 7 T. R. 64. But here, there was the previous design to pay; the acceptance of 30s. part payment, † which of itself would have prevented the plaintiff from following the cattle as against Neill, the transitus being determined; and the delivery of the cattle. Neill had desired that the cattle should be sent to the railway, and the report of the learned Judge states the evidence of the plaintiff, that his "men drove the cattle to the railway station, where they left them for Neill; where they remained till evening, and were then forwarded by cattle train to Dublin." If Neill had re-sold the cattle at the fair, the plaintiff could not have taken possession from the sub-purchaser,‡ the property having passed to Neill by the delivery without demanding the price: *Haswell* v. *Hunt*, 5 T. R. 231; *Milwood* v. *Forbes*, 4 Esp. 173. In order to prevent the property passing, there must have been a pre-conceived design to defraud: *Earl of Bristol* v. *Willsmore*, 1 B. & C. 514. The question is, what was the intention of the purchaser? *Stephenson* v. *Hart*,§ 4 Bing. 476. The passing of a cheque which there are no funds to meet

* So, by giving an unproductive cheque, though the debtor had previously tendered cash *Everett* v. *Collins*, 2 Comp. 505. And see cases cited, Benjamin on Sales, 541, 546.—REP.

† As to the effect of part payment, with respect to the right of stoppage *in transitu*, see *Hodgson* v. *Loy*, 7 T. R. 440; *Feize* v. *Wray*, 3 East, 103. In *Dixon* v. *Howeston*, cited *in notis onte*, observe, there had been a payment, but not on account. In *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 32, it has been held that, though goods have been delivered to a railway company for a vendee, and even after the transitus has been determined, the contract may be rescinded by the vendor, by reason of fraud, and the property re-vested in and resumed by the vendor, if no intermediate interest has vested in an innocent person.—REP.

‡ But were Neill subsequently convicted, see *Nickling* v. *Heaps*, 21 L. T., N. S. 754. —REP.

§ It is observed in Benjamin on Sales (as to which, see note, 5 Ir. L. T. R. 192) that this is a very doubtful

* See Hammond N. P. 283; *Watson* v. *Poulson*, 15 Jur. 1111.—REP.

† See *Watson* v. *Poulson*, 15 Jur. 1111, 1 C. M. & H. 340.—REP.

‡ So, see *Fowler* v. *Hollins*, (Ex. Ch.) L. R. 7, Q. B. 835; *Ex parte Swan*, 7, C. B. N. S, 440.—REP.

does not necessarily import fraud, but even if it might be implied from the first finding of the jury standing alone, it has been negatived by the second: *R.* v *Waine*, 11 C. C. C. 647; *Hawse* v. *Crowe*, Ry. & M. 414. If Neill, when he gave the cheque, had reasonable ground for believing that it would be met, the property having already passed, could not be divested by the circumstance of the cheque not being subsequently productive; and the vendor's remedy would be to sue for the price of the goods sold. [LAWSON, J.—It is one thing, to buy goods, paying simply by a cheque, which the purchaser may have reasonably expected there were funds then in bank to meet; but it is another matter, when it is to be met by the proceeds of a subsequent re-sale of those very goods.] A cheque only implies, in the ordinary course of mercantile business, that it will be honoured on due presentment; *Cumming* v. *Shand*, 5 H. & N. 95. It could not have been presented on the day it was drawn, and the re-sales were early in the following morning before bank hours. The plaintiff's argument must go the length of contending, that the giving of a bill is an implied representation of the solvency of the drawer.* [MONAHAN, C. J.—If a person takes a bill payable *in futuro*, surely he takes his chance, not looking to the credit or solvency of the person against whom it is drawn alone, but being able to discount it.] Unless the goods were obtained by a felony or mere fraudulent trick, the contract was not void. [LAWSON, J.—The fraud here having been by a material misrepresentation, the right of the party was to rescind the contract.] The doctrine that fraud renders contracts voidable not void is a modern graft on the old law that, in case of felony, the property would not pass.* But, in order to entitle the vendor to rescind, it would not be enough that the representation were false in fact, unless it were made fraudulent (not necessarily in a criminal sense), and in the inception of the transaction: *Childers* v. *Wooler*, 2 E. & E. 287; Benjamin on Sales, 338, 345. Until disaffirmance, the defendants, as Neill's agents, would be entitled to sell. When was the contract disaffirmed? Not on the 14th. There never has been an absolute disaffirmance, and the plaintiff still retains the 30s. part payment.† While

authority, "under the modern doctrine, which clearly holds that the property does pass when the *vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention. (p. 325)—REP.

* It may be observed that with respect to the purchase of foreign bills on 'Change, there is, according to the custom of merchants, an implied representation that the purchaser has money ready to pay for them, and that they are to be paid for in cash, three days' grace being allowed. The purchase of bills by a trader, without means of payment, was held to be a fraudulent dealing, though non-payment after the days of grace was stated to have been caused by an unexpected refusal, meantime, of a firm to continue to honour the purchaser's drafts, which the firm had long been accustomed to accept; *Re Simond*, 26 L. J. Ba. 49. Per Knight Bruce, L. J.; "On the 12th of February, bills were brought on 'Change substantially as a ready money-transaction, for though according to the ordinary course of business, payment was not to be made till the Friday, the purchase having been made on a Tuesday, I am satisfied by the evidence that, on purchases of foreign bills, there is an understanding according to the ordinary course of business, as certain and as clear as if the fact were positively stated, that there is ready-money for the payment."—(*ib.*) See *R.* v. *Hughes*, 1 F. & F. 355, as to false representation respecting the time of payment of a bill of exchange. It may also be noticed that the doctrine of *Bickerdike* v. *Bollman*, 1 T. R. 405, 2 Sm. L. C. 45 (now overruled, *Watson* v. *Minchin*, 1 Jones 533), that a drawer, having no funds in the hands of a drawee, is not entitled to notice of dishonour, has been considered to have proceeded upon the ground that so doing, "like the giving of a cheque upon a bank where the drawer has no funds," (Edwards on Bills, Amer., 429), is a fraud on the part of the drawer: *Clegg* v. *Cotton*, 3 B. & P. 242; *Cory* v. *Scott*, 3 B. & Add. 625; 1 Parsons on Bills, Amer., 533. But it was held that, if the drawer had reasonable ground to expect that the bill would be honoured on the strength of a consignment, though no effects ever came to the hands of the drawee, or if he had reason to expect that funds would be supplied by a third person, the bill could not be considered mere visionary paper given in bad faith, and the drawer would be entitled to notice of dishonour; *Lafitte* v. *Slatter*, 6 Bing., 623; *Rucker* v. *Hiller*, 3 Camp., 217. With respect to promissory bank notes, Littledale, J., observes, "I think that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed," *Camidge* v. *Allenby*, 6 B. & C., 385. But if, though such securities be genuine, they are known to the buyer to be worthless when he passed them, his conduct would be deemed fraudulent (ib., *Read* v. *Hutchinson*, 3 Camp. 352; *Stedman* v. *Gooch*, 1 Esp. 3; *R.* v. *Dowey*, 11 C. C. C. 155); and the vendor would be entitled to rescind the sale and bring trover.—REP.

* As to the distinction herein, between larceny and false pretences, see note to 5 Ir. L. T. R. 192, and *R.* v. *Prince*, 17 W. R. 179.—REP.

† In *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 26; 14 L. J. Ex. 17; 20 W. R. 189; most fully reported, 25 L. T. N. S. 708; Mellor, J., delivering the judgment of the Ex. Ch. (Dec., 1871), says—"the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract, and resume his property." (And see note to 5 Ir. L. T. R. 192). But "no man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money [there a part-payment; and see *Watson* v. *Russell*, 3 B. & S. 425, 5 *ib.* 968] or other advantages which he has obtained under it." (*ib*): "The commencement of an action of

the contract still subsisted, the cattle were re-sold in open market by the defendants, in their ordinary course of business,* by which they became entitled to commission, and the proceeds were duly applied to pay the debt from Neill to the defendants, the position of both being altered. Any disaffirmance could only take place subject to intervening rights, and as against the defendants the vendor cannot now elect to avoid the sale, to Neill: *Oaks* v. *Turquand*, L. R. 2 H. L. 325; *Kingsford* v. *Merry*, 1 H. & N. 503, 11 Ex. 577; *White* v. *Garden*, 10 C. B. 919; *Masters* v. *Ibberson*, 8 C. B. 100. There is no connexion between the defendants and Neill as conspirators, nor is there any finding that he was their agent. The sale was for cash, and it was Neill's own act to substitute the cheque, and to buy more cattle than he had ready money at the fair to pay for. The findings do not imply previous knowledge on the part of the defendants, but that, at the time of the re-sale, they were aware of the circumstances under which they had been bought; there being a complete and unrescinded sale. Money had and received will not lie unless trover lies, the doctrine of waiving the tort applying only as between the parties to the transaction, and as against a party to the fraud; but, here there was a complete sale to Neill, there was no privity between the plaintiff and the defendants, and there was no agreement by the defendants with the plaintiff that the money was to be held for his use: *Baron* v. *Husband*, 4 B. & Ad. 611; *Williams* v. *Everett*, 14 East 581; *Moore* v. *Bushell*, 27 L. J. Ex. 3; *Hill* v. *Royds*, L. R. 8 Eq. 290.

H. H. Macdermott replied.

Cur. adv. vult.

MONAHAN, C. J.—This case comes before the court upon a motion to enter a verdict for the defendants pursuant to leave reserved, or for a new trial on the ground of misdirection. I do not generally deliver the judgment myself on these motions, where the case has been tried before me; but, as the questions involved have been already before my brothers Keogh and Lawson upon a former motion, in an earlier stage of this case, it has been deemed advisable that, in this instance, I should deliver the judgment. The plaintiff sues in trover and for money had and received. The facts of the case are correctly stated in the report of the former proceedings. But, in order to render the judgment intelligible, I shall shortly refer to the facts as they now appear. The plaintiff, owning some cattle, brought them to a fair in Kilkenny to be disposed of. He there met a person named Michael Neill, with whom he had previously been unacquainted, but whom he knew by appearance; he had seen Neill at fairs on previous occasions, and knew that he was a cattle buyer. Neill bought these cattle, for which he was to pay the plaintiff £141. It was altogether a cash transaction. Therefore, there is no doubt that, at the time of the sale, the plaintiff was entitled to be paid in cash. Neill asked the plaintiff to send the cattle for him to the railway, that they might be forwarded to Dublin; and asked the plaintiff to meet him at a hotel, at one o'clock, in order to receive the price. Assuming that he would be paid as indicated, the plaintiff sent the cattle to the railway for Neill. The plaintiff subsequently returned to the hotel, and there Neill gave him a cheque on the Royal Bank, which the plaintiff accepted, supposing it would be cashed as of course. The plaintiff then lodged the cheque in the Hibernian Bank at Kilkenny. The bank transmitted it to their Dublin correspondents, in order that it should be the next day presented. It happened, however, that it had been incorrectly endorsed; and, in consequence of this mistake, it was returned, but not on the ground of there being no funds. The mistake having been rectified, the cheque was again transmitted, a day or two afterwards, for presentment, but on presentment, payment was refused, on the ground that there were no funds. It further appeared at the trial that Neill had been transacting business for a number of years with the defendants, to whom he used to entrust his cattle to be sold by them as factors. He himself used to frequent the fairs, purchasing cattle on his own account, and not at all as the agent of the defendants. He was considerably in their debt, and for a portion of their demand they held some securities. They had given a guarantee to the Royal Bank in order to secure advances to Neill, which he was in the habit of drawing from the bank. The course pursued was that the defendants, having sold Neill's cattle, used, after deducting a certain percentage, to lodge the balance of the proceeds to his credit in the bank, so that on the following day he would

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trover—which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully—cannot, without more, be taken to be an election to avoid the transferer:" *Newnham* v. *Stevenson*, 10 C. B. 723, H. L. So long as the vendor has made no election, he "retains the right to determine it either way, subject to this, that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of the delay, the position *even of the wrong-doer* is affected, it will preclude him from exercising his right to rescind:" *Clough* v. *L. & N. W. Ry.*]—REP.

* See *Fowler* v. *Hollins*, L. R. 7 Q. B. 616.—REP.

have funds in the bank. But on the present occasion, without any previous intimation, and with full knowledge of the circumstances under which the cattle had been bought, and that they were paid for by a cheque, and that there were no funds to meet it except the proceeds of the re-sale which were to have been lodged, the defendants resolved to close on these proceeds; they did so, terminated the guarantee, and repaid themselves the money advanced.

At the former trial, I left to the jury four questions. [His Lordship read same, and the findings thereon]. On the findings of the jury, I directed a verdict for the defendant. The case was afterwards argued at considerable length, and judgment was delivered by my brothers Keogh and Lawson. The court were of opinion that the questions then put were not exactly right; and, I believe, they thought that there ought to be an inquiry as to the state of Neill's account at the time of the passing of the cheque.* On the present trial, had before me at the sittings after last Michaelmas Term, the facts established were substantially alike, and the questions submitted by me were substantially similar, all which questions the jury have answered in the affirmative. [His Lordship read the questions]. On these findings, I directed a verdict for the plaintiff, reserving leave for the defendants to move to have a verdict entered for them, if the court should be of opinion that I ought to have so directed on the findings of the jury. The conditional order to set aside the verdict, pursuant to leave reserved, and to enter it for the defendants has been obtained on the grounds of misdirection. But there is no question before us as to the setting of the verdict aside on the grounds of being against evidence or the weight of evidence. The jury find that, at the time the cheque was accepted, Neill in effect represented that there were, that moment, funds in the bank to meet it. That is a proper finding, even if there were no express representation, because there was an implied representation. The plaintiff was not, from any previous dealings with or knowledge of Neill, likely to have taken the cheque on credit. And the jury were justified in considering that he received it on the faith of an implied promise that there were immediate funds to meet it. It further appears that, at the time of giving the cheque, Neill had reasonable grounds for believing and did believe, not that there were funds then in the bank to meet it, but that there would be funds to meet it when presented; and I do not quarrel with the finding, because naturally Neill would have expected that the defendants would continue to do as for years they had done, and on the faith of that expectation he brought these cattle to them, in order that the balance of the proceeds should be applied so as to meet the cheque, drawn on the faith that there would be these funds to meet it. But the question now is, under the circumstances, what were the plaintiff's rights? It was argued, in my opinion successfully, that it would be impossible on these findings to convict Neill of having obtained the goods by false pretences. It is not necessary to go that length; but I assume that the jury would not find him guilty in this respect, as they would had the cheque been drawn on a bank on which he had no right to draw, and which he had no expectation would have funds to meet it. The question here, however, is, not whether Neill has committed a crime for which he should suffer penal servitude, but, whether there was a false representation—false to the knowledge of Neill at the time—which would entitle the plaintiff, as soon as its being a misrepresentation came to his knowledge, to annul the contract, and to recover the goods in specie if they continued in the hands of the person making the misrepresentation. We entertain no doubt on the subject. The general law—recognised in the well-known case of *Street v. Blay*, 2 B. & Ad. 456, holding that a breach of warranty would not entitle the purchaser to rescind the contract, his only remedy being for damages on the breach—is that, if a person makes a representation, not knowing that it is false, the only remedy is by action for the breach of the representation; while, where there is a false representation—false to the knowledge of the person making it—which will vitiate the sale, the vendor is entitled to rescind the contract itself. Here the jury have found that there was a false representation—false to the knowledge of Neil—and in that finding they were justified. It follows, as of course, that, had Neill retained the cattle, the plaintiff could recover from him in trover, and the cattle having been re-sold, he might waive the tort, according to a well-known doctrine, and sue for money had and received. The defendants are not purchasers without notice, or other meritorious persons who had acquired new rights not possessed by Neill. They received the cattle with full knowledge of the circumstances under which they had been bought by Neill, and that the purchase was upon a false representation. There is, therefore, no distinction between the position of the defendants and that of Neill.

*The verdict was set aside as being against the weight of the evidence.—REP.

The action could have been maintained against Neill, and it may also be maintained against the defendants. Accordingly, the verdict, as found, must remain as it stands; and the plaintiff is entitled to the costs of both trials and of this motion.

I may add that my brothers Keogh and Morris concur in our judgment.

Lawson, J.—I also concur. This case does not come within the principle laid down in *Kingsford* v. *Merry*, that if there have been a false representation of a material fact, and if it have been a part of the contract, the contract may be rescinded, immediately on the falsity of the representation being discovered. The sale in this case was for cash, and it is clear that, as the paper received was worthless, the plaintiff has a right to rescind the contract; and so doing, he may sue in trover or for money had and received. Do the defendants stand in a better position than Neill? They contend that Neill was innocent in the transaction. The only circumstance that could make Neill innocent was that, by the course of dealing between them, they were to have supplied the funds to meet the cheque, and that he had reason to expect that they would do so; but they deliberately declined to do so, and (to use the phrase of one of the witnesses) "closed upon" the proceeds of the re-sale of the cattle. Were the law to tolerate such a course of proceedings, they might advance any amount to Neill from time to time, and would have nothing to do, in order to repay themselves, but to carry on the affair until he had got cattle sufficient to realise a sum large enough to clear off their demand, and forthwith close upon the product of the sales.* In my opinion, they are not in a better but in a worse position than that of Neill, and they cannot be heard to insist upon the *bona fides* of the transaction. No doubt, if an innocent purchaser intervenes, before the disaffirmance of a contract by the vendor, as, for instance, if there be a sale in market overt, the vendor could not proceed against the *bona fide* transferee. But here, the jury have found that the defendants were aware of the circumstances under which Neill had bought the cattle, and that there were no funds to meet the cheque, except the proceeds of the re-sale of the cattle by them; and in such case, there is no room for the application of any such exceptional doctrine. The verdict must, therefore, be upheld.

Conditional order to enter a verdict for defendants discharged.

* See *Hilliard* v. *Cagle*, referred to in Com. on the principal case, 6 Ir. L. T., 637.—Rep.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

Hilton v. Ankesson.

Fences—Non-liability to repair—Straying of cattle from defects of—Distress damage feasant.

An owner or occupier of lands, though bound to take care that his cattle do not wander from his own land, and stray upon the land of another, is under no legal obligation to put up or maintain a fence so as to prevent the cattle of his neighbour straying upon his land: such an obligation can only be founded upon a statutory obligation, or some agreement or covenant.

The plaintiff was the occupier of a field, which was separated from a field in the occupation of the defendant by a hedge or fence. In consequence of this fence being out of repair, the plaintiff's cattle strayed into the field of the defendant, and were seized by him as a distress damage feasant. Upon an action brought by the plaintiff for this seizure of the cattle, the pleadings raised the issue of whether or not the defendant was bound to repair the hedge through which the cattle escaped, and the only evidence of liability consisted in the practice for fifty years and upwards, of the defendant and his predecessors to repair such hedge:

Held, that this was in itself no proof of such liability.

[Ex. Nov. 21, 1872. 27 J. T. N. S. 519.]

This was a rule calling upon the defendant to show cause why the non-suit should not be set aside, and a new trial be had upon the ground that there was evidence to go to the jury of the defendant's obligation to repair the fence, and evidence to go to the jury to support the plaintiff's case.

The declaration was for trespass and illegally impounding the plaintiff's cattle. The defendant pleaded (second plea) that he seized the cattle as for a distress damage feasant. To this the plaintiff replied (second replication) to the second plea that before the time when the said cattle were so as aforesaid in the close of the defendant, the plaintiff was possessed of a close contiguous and next adjoining the said close of the defendant, and the defendant and all other tenants and occupiers of the last-mentioned close for the time being from time to time whereof the memory of man is not to the contrary, have repaired, and of right ought to repair, the hedges and fences between the last-mentioned close and the said close of the plaintiff as often as need hath been and required in order that cattle being feeding and depasturing in those closes respectively might not err or escape out of the one into the other of them through the defects of the said hedges and fences, and because the said hedges and fences between the said closes of the defendant and the plaintiff, before and at the time when, &c., were ruinous and in decay for want of needful repair thereof, the said cattle then lawfully

being and depasturing in the said close of the plaintiff a little before the time when, &c., erred and strayed out of the last-mentioned close into the close of the defendant through the defects in the said hedges and fences between the said closes, and on that occasion were in the said close in which, &c., until the defendant of his own wrong, and before the plaintiff had notice of the premises and could remove the said cattle, committed the trespass in the declaration mentioned.

The case was tried before Bramwell, B. at the Lewes Assizes. The facts of the trespass and seizure were admitted, and the only question was, as to whether or not the defendant was liable to repair a certain hedge which separated his field from that of the plaintiff, and through the want of repair of which hedge the plaintiff's cattle strayed into the field of the defendant. In support of the plaintiff's case the plaintiff was called, but he had only lived on the farm a few months, and could give no material evidence upon the point; but a Mr. Greenfield who was a former occupier, and also the steward of the landlord, were called, and they proved that the occupier of the defendant's farm had from time to time for fifty years done what repairs were necessary, and Mr. Greenfield upon being asked why he had done so? replied because he thought that every man was bound to keep his hedges in repair. Both the witnesses however failed to show any legal obligation upon the occupier to do the repairs. Upon this, the learned judge directed a nonsuit with leave to move to set it aside. A rule having been accordingly obtained.

Parry, Serjt., and *Joyce*, showed cause.—There was no evidence adduced on the part of the plaintiff to show any obligation on the part of the defendant to keep up or repair the hedge separating the two fields. The law is very clear, and was fully considered in *Boyle* v. *Tamlyn*, 6 B. & C. 329. The marginal note there is, "Where the owner of two adjoining closes (A. and B.), separated by a fence and gate which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant: Held, that the latter was not bound to repair the gate unless he or his vendor had made some specific bargain with the plaintiff to that effect, and that the doing of occasional repairs was not evidence of such bargain." In his judgment in that case Bayley, J., says: "There can be no doubt that the general rule of the law is that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the land of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive unless express words be introduced into the deed of conveyance for that purpose." In the present case there was no evidence whatever to show a legal liability on the part of the defendant to repair the hedge, and the fact that he and his predecessors were in the habit of doing so was no evidence of an obligation. It was the duty, therefore, of the plaintiff to see that his cattle did not escape from his own land on to that of another.

Hawkins, Q. C., and *Grantham*, in support of the rule. It was entirely a question for the jury. The defendant and his predecessors having always repaired the hedge, it was a fair inference to draw that they were under some legal obligation to do so. Mr. Greenfield who occupied before the defendant, stated that he believed he was liable to repair the fence. Where it is necessary for the safe keeping of cattle that there should be a fence, it might properly be assumed from the conduct of the parties that there is a legal liability to repair; if otherwise, it would be necessary that each occupier of adjoining fields should have a separate hedge. They cited *Singleton* v. *Williamson*, 31 L. J. 17, Ex.

KELLY, C. B.—I am of opinion that the nonsuit was right, and that the judge was not justified in leaving any of the facts in the case as evidence of a liability to repair. A liability to repair a fence can only be created by Act of Parliament, or some agreement or covenant which will constitute a binding contract between the parties. Undoubtedly, there may be evidence of such an agreement or covenant by the acts of the parties, as where a person is called upon to repair, and he has repaired accordingly; in such a case, although the evidence would be by no means conclusive, it would still be evidence for the consideration of the jury. But there is no such fact here. The evidence is simply this, that the defendant had kept his land fenced. That, however, was no evidence of a liability to repair. If a man chooses to surround his land with a fence, he may pull the fence down again at any time. He may erect a fence to prevent his cattle from

straying upon the property of his neighbours. That which he had a right to set up he has a right to pull down; and no matter how long he has had it up or repaired it, that affords no evidence of a legal liability to repair it. It would really be alarming if the law were otherwise—if a person who once set up a fence were compelled to keep it up. In this case I cannot see a particle of evidence of the liability of the defendant to repair the hedge; and the learned judge was quite right in so holding.

CHANNELL, B.—I also am of opinion that this rule should be discharged. The question is whether there was a fence which the defendant was liable to repair? I really cannot see that there is any evidence whatever of any such liability. It certainly seems that for fifty years at least the fences were kept up by the defendant and his predecessors; but they were kept up for his own purposes, and not for the sake of his neighbours; and it is argued that such repairs are evidence of an obligation to repair, but no such legal obligation is to be inferred from such acts of repairing.

PIGOTT, B.—I am of the same opinion that there was no evidence of a liability on the part of the defendant to repair the fence. When the rule was moved I understood that there were additional facts, such as that the defendant had repaired the fence, when it was not necessary that he should have done so for his own purposes, but now it is quite clear that that was not so. It was certainly necessary that some evidence should have been given of the obligation to repair, such as that he had been called upon by his neighbour to repair, and he had repaired accordingly.

BRAMWELL, B.—I continue of the same opinion that I entertained at the trial. It is quite clear that there is no obligation to fence land that has not been fenced before. Well, if a party is not bound to fence, he may take down any fence that he may have put up, or he may let it fall down. It is said, however, that his repairing the fence is evidence that he is bound to repair it; but as he puts it up for his own purposes he may surely take it down again. Again, it is said that the witness said he thought he was bound to repair his fence, and, therefore, he did repair it. This, however, shows no obligation to repair. There was no requisition to repair, and no repairing in consequence. To hold that a man who erects a fence, and repairs it from time to time, is bound always to continue it, would involve a serious state of things.

Rule discharged.

CORRESPONDENCE.

Election of Mayor—Mode of Voting.

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—On the election of Mayor for this city, the question was raised as to the proper mode of proceeding, whether by placing all the candidates before the Council at once, as in an ordinary election by the people, and the one receiving the highest number of votes (although not a majority of the whole Council) being declared elected,—or, by the method heretofore followed, namely, by resolutions and amendments consecutively voted upon until some candidate receives a majority of the whole council. The clerk decided upon the latter as the legal mode: that of resolutions and amendments.

Mr. Harrison in his Manual appears to hold differently—see sections 66, 105, 121 and note (*d*); sec. 129 and note (*s*).

Will you please give your view of the matter?

Yours truly,
R. R. WADDELL.

Hamilton, 23rd Jan. 1873.

[The references given to the Municipal Manual by you do not shew either dissent from or assent to the mode adopted by the city, which is, we believe, the rule generally followed.—EDS. L. J.]

REVIEWS.

A TREATISE ON CRIMINAL LAW AS APPLICABLE TO THE DOMINION OF CANADA. By S. R. Clarke, of Osgoode Hall, Barrister-at-Law, Toronto. R. Carswell, 1872. Price $5.

We have looked through this volume with much interest. It should be the aim of the Dominion Legislature, as soon as possible, to make the laws of the several Provinces homogeneous, and so far as Criminal Law is concerned, it has the power to do so without any reference to the several Legislatures of the Provinces. So far as the laws regulating property and civil rights are concerned no Act of the Dominion Legislature to secure uniformity can have effect in any Province until adopted and enacted as law by the Local Legislature thereof. The Dominion Legislature has already to a great extent

made the Criminal Laws of the several Provinces uniform.

Mr. Clarke in view of this fact was encouraged to prepare the Treatise now before us. It will therefore be read with as much interest and be of as much service in British Columbia, Manitoba, Nova Scotia, or any other of the Provinces as in the Province of Ontario where it has been published. And in order that the work may reflect the law of each Province as well as the law of all the Provinces the author has collected decided cases on Criminal Law in the several Provinces. To these he has added the decisions from the English Law reports. The result is a treatise tolerably complete.

The work appropriately opens with an introductory chapter on the Criminal Laws prevailing in the Dominion. It is a valuable historical sketch, and has evidently been prepared with much industry. References to decisions early and late in the several Provinces are frequent. Though by no means a practical chapter, it is one to which the student may refer with profit and advantage.

The next chapter in the work is devoted to the Law of Extradition. The author discusses this difficult and little known branch of law with much intelligence. We have been agreeably surprised to find references made to every Canadian case on this branch of the law of which we have any knowledge. Few men who have not been engaged as counsel in Extradition cases could treat the subject more satisfactorily than Mr. Clarke has done. He has not spared himself any trouble in the collection of his materials. And we must say he has made a very creditable use of them. The chapter on Extradition alone, containing about 50 pages, is worth more than the entire cost of the work to a man engaged or likely to be engaged in an Extradition case. The Treaty in which this country is chiefly interested is of course the Ashburton Treaty. It is restricted in its operation to the crimes of murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the uttering of forged paper. It might with advantage to this country and to the United States be extended to cases of larceny and fraud. It is not to the interest of either country that it should be the asylum of the thieves or swindlers of the other. Our Government is remiss in not having long since done something towards the extension of the Treaty. Canada being a much smaller country as regards popuation than the United States, the proportion of thieves and swindlers that we receive for those that we lose is greatly against us. It is a kind of reciprocity that may be desirable, but we do not like to find "the balance of the trade" yearly so strongly against us. It has always appeared to us that, without reference to the Imperial Government, we have power to expel thieves and swindlers as a matter of simple police and domestic legislation. The Legislature of the old Province of Upper Canada exercised such a power. It is a power as it seems to us as necessary for domestic comfort and self-preservation as the hanging of murderers or imprisonment of thieves who commit crimes in our own country. Should our Government fail to take any step in the matter we hope some independent member of the Dominion Legislature will introduce a measure on the subject, and we cannot but think that the simple pressure of sound reason and ordinary common sense will carry it through. Legislation of this kind is imperatively demanded. This in all probability is the reason that we have not yet obtained it. Legislation in modern days in Canada is not had to meet the requirements of the age, so much as to amuse young members, flatter their vanity and air their eloquence.

The two chapters which we have so far noticed are merely introductory to the main body of the treatise. The remaining chapters are devoted to the following subjects:—Crimes in General, Persons capable of committing Crimes, Offences principally affecting the Government, the Public Peace or Public Rights, Offences against the person, Offences against Property, Perjury, Conspiracy, Annotations of Miscellaneous Statutes, Evidence, Pleading and Practice.

These are the ordinary divisions of treatises on crime. We have neither time nor space to examine these chapters much in detail; but we may say that throughout them we observe a general sprinkling of Canadian cases which cannot be found in any similar treatise. There are some omissions and some typographical blunders, but where there is so much to praise we do not care to censure. We certainly look upon the work as a perform-

Court of Common Pleas. Fourth Division: The Judges of the Court of Exchequer.

Business of the Court.

To be distributed according to the divisions: Crown business in the First Division (Queen's Bench); admiralty, bankruptcy, and business for which the Court of Chancery is the only available machinery, and such cases as separate themselves from ordinary actions, Second Division; Common Pleas business in the Third Division (Common Pleas); and revenue business in the Fourth Division (Exchequer).

To be a court of appeal from the inferior courts.

To have power to transfer causes from any one division to any other.

Sittings of the Court.

Single judges will sit in matters hitherto disposed of by single judges, and there will be a plurality of judges in other cases, not to exceed three.

Official referees to be attached to the divisions to act as arbitrators in cases unfit to be tried by jury; references to be compulsory as to questions of fact.

Continued sittings in London to be provided for.

Abolitions.

The Courts of Common Pleas of Lancaster and Durham.

The division of the legal year into terms.

New Procedure.

Formal proceedings to be taken in the local registries in the country.

Rules

To be framed as a schedule, but to be open to modification or alteration by the judges.

ATTACHMENT OF DEBTS—DIVISION COURT JURISDICTION.

The Act of 1869, to amend the Acts respecting Division Courts, gave new and extensive jurisdiction to these courts, and, as might be expected, important questions were raised on nearly all its clauses. Very shortly after the Act came into operation a question of very general interest arose as to the power of the courts to try and determine claims against garnishees where the indebtedness to the primary debtor exceeded in amount the general jurisdiction of the Division Courts. Several of the judges held that the power existed—amongst them, if our memory serves us, the judges of Wellington, Elgin, Brant and Simcoe—but no case fairly on the point has been decided by the courts above. It has always seemed to us that the Division Courts must of necessity have jurisdiction in such cases, otherwise the garnishee clauses in the Statute would to a great extent be valueless, and the language in the clauses and the forms support this view.

The point referred to has been recently very carefully considered by the judge of Wentworth, and we have obtained the judgment which Judge Logie delivered in the first Division Court in *Sandercock v. Reid—McCarthy* garnishee. The debt due by the garnishee to the primary debtor was upon a contract for building a house—contract price being $460 and extras $78—the amount due by garnishee was insufficient to pay all in full. Several questions arose at the trial, but we shall only refer to the material ones. It was contended for the garnishee that the subject matter of the debt was beyond the amount which the court had jurisdiction to deal with; 2nd. Questions as to priority amongst the primary creditors came up—priority being claimed by one who had obtained a judge's order after judgment over another creditor who was first in time, but preceeded by the attaching summons against debtor and garnishee. We extract the following from the judgment of the learned judge.

It is provided by section 5 of the Division Courts Act of 1869 (32 Vict., ch. 23) that when any debt or money demand of the proper competence of the Division Court, and not being a claim strictly for damages, is due from any party to any other party, either on a judgment or otherwise, and any debt is due and owing to the debtor from any other party, it shall be lawful for the party to whom such first mentioned debt or money demand is so due and owing, to attach and recover in the manner therein provided, any debt due and owing to his

debtor from any other party, or sufficient thereof to satisfy the primary creditor. Section 6 directs the mode of procedure when the primary creditor's claim is a judgment, and declares subsection 2 that the service of the judge's order on the garnishee shall have the effect of attaching and binding in his hands all debts due and owing from him to the primary debtor or sufficient thereof to satisfy the judgment. Subsection 6 of the same section empowers the judge to give judgment against the garnishee for the amount so owing by him, or sufficient thereof to satisfy the judgment. When the primary creditor's claim is not a judgment, the mode of procedure is pointed out by section 7. Subsection 8 authorizes the judge to give judgment against the garnishee for the amount found to be due from the garnishee to the extent of the amount found to be due from the primary debtor. Section 9 enacts that in all cases under the Act (except where an attaching order has been served, already provided for) service of the summons on the garnishee shall have the effect of binding in his hands the debt sought to be garnisheed from the time of such service.

If the claim of the primary creditor against the primary debtor is of the competence of the Division Court, the Court has jurisdiction, and service of the attaching order or of the garnishee summons, as the case may be, binds the debt due by the garnishee, whatever be its amount, to the extent of the primary creditor's claim, and being bound the primary creditor may proceed to recover, although in order to do so the judge may have to investigate an account exceeding the jurisdiction of the Court. The words of section 5 are that he may attach and recover; sections 6 and 7 state how he may recover. There is nothing in the statute limiting the right to recover against the garnishee, to cases where the Court would have jurisdiction to try the question of indebtedness in actions between the primary debtor and garnishee. On the contrary, the intention of the Legislature seems to have been, not only to attach the debt, but also to enable the creditor in all cases to enforce the attachment and recover in the same court, and not to compel him to go into equity to make the attachment effectual for the recovery of the debt. The Court having jurisdiction in the original matter between the primary creditor and primary debtor, that jurisdiction draws after it the right to try and determine the amount due by the garnishee, although it may involve the investigation of an unsettled account exceeding $200. It is in principle not unlike the case of an interpleader where the Court has jurisdiction to try and dispose of the claimant's rights, though in doing so the title to land may be involved: *Munsie v. McKinley*, 15 U. C. C. P. 50.

With regard to the question which has been raised as to the priority between these creditors, I think that service of a garnishee summons where judgment has not been obtained, binds the debt due by the garnishee as fully as service of an attaching order after judgment. The statute makes no distinction, but states the effect of service in each case to be the same, that of binding the debt in the hands of the garnishee. If an attaching order served after a garnishee summons had priority because it was a judge's order upon a judgment, service of the garnishee summons would not have the effect, which the statute expressly says it shall have, of binding the debt from the time of service. The garnishee must rank in the order of service, the last one taking the small balance which will be left in the hands of the garnishee after payment of the other two claims; but the two primary debtors are not entitled to have their costs paid out of the moneys in the hands of the garnishee, these moneys being bound only to the extent of their respective claims.

LAW SCHOOL—INAUGURAL ADDRESS.

The Treasurer of the Law Society, the Hon. John Hillyard Cameron, opened the Law School by an address, the leading features of which we give below, for the benefit of those who had not the good fortune to be present. As the address was an extemporary one, delivered without the use of notes of any kind, we do not pretend to give it *ipsissima verba*, but we believe our reporter has faithfully sketched the substance. It is always a pleasure to listen to a speech delivered by the eloquent leader of the Bar of Ontario, on any subject. In this case that pleasure was enhanced by the speaker treating of a matter in which he has always taken the heartiest interest, and to which he has devoted much thought and time.

The interest was kept up throughout by numerous anecdotes and incidents of early professional life in this Province, related in

This book is no exception. It is a work much needed by the profession, and if we can judge from the short time that we have been able to devote to an inspection of it, one that will amply repay anyone adding it to his library. The treatment is most exhaustive and comprehensive, and the arrangement of the component parts, all, in our opinion, that could be desired. The usefulness of the work in this country will be admitted when it is remembered that a much greater similarity exists between our municipal institutions and those of the United States, than between ours and those of Great Britain. True, municipal government is not carried to the same extent with us as it is in that of the author of this work, but the duties, powers and liabilities of our municipal corporations are much more enlarged than those of England. Thus, it will be found that on reference to this work, many cases will be found "in point," where a search in an English work would be fruitless.

It is not our purpose to attempt anything like an analysis of this volume—one of some 800 pages—peculiar as it is, to a certain extent, in its arrangement; suffice it to say that it commences with a review of municipal institutions, from the almost perfect ones of early Rome down to the present time; contrasting at some length those of England and the United States. The various kinds of municipal corporations, how created and how dissolved, their powers, extent, and liabilities, are discussed. It concludes with a couple of valuable chapters on the various remedies to prevent, correct and redress illegal corporate acts, and the different civil actions against, and liabilities of, such corporations. The volume is enriched by copious notes in which upwards of four thousand cases are referred to, many of them being given in substance. The work is well got up, being printed on excellent paper, with clear bold type, and substantially bound.

The Legal Chronicle, Vol. 1. No. 1, Pottsville, Pa. U. S.

The first few numbers of this new undertaking have reached us. The publication is weekly, and its chief aim, like that of most of the United States weekly publications devoted to law, is to disseminate the opinions of the Courts in advance of the regular reports.

SPRING ASSIZES, 1873.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

1.	Brockville	Tuesday, 11th March
2.	Perth	Monday, 17th "
3.	Cornwall	Friday, 21st "
4.	Kingston	Tuesday, 1st April
5.	Ottawa	Tuesday, 8th "
6.	L'Original	Tuesday, 1st May
7.	Pembroke	Monday, 12th "

MIDLAND CIRCUIT.

THE HON. THE CHIEF JUSTICE OF ONTARIO.

1.	Whitby	Tuesday, 11th March
2.	Belleville	Tuesday, 18th "
3.	Napanee	Wednesday, 26th "
4.	Cobourg	Monday, 31st "
5.	Peterborough	Wednesday, 9th April
6.	Lindsay	Tuesday, 15th "
7.	Picton	Tuesday, 13th May

NIAGARA CIRCUIT.

THE HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

1.	Milton	Monday, 10th March
2.	Hamilton	Monday, 17th "
3.	St. Catharines	Monday, 31st "
4.	Welland	Monday, 7th April
5.	Barrie	Monday, 14th "
6.	Owen Sound	Thursday, 24th "

OXFORD CIRCUIT.

THE HON. MR. JUSTICE GWYNNE.

1.	Simcoe	Tuesday, 11th March
2.	Guelph	Friday, 14th "
3.	Stratford	Monday, 24th "
4.	Berlin	Monday, 31st "
5.	Brantford	Friday, 4th April
6.	Woodstock	Tuesday, 15th "
7.	Cayuga	Tuesday, 22nd "

WESTERN CIRCUIT.

THE HON. MR. JUSTICE WILSON.

1.	Sandwich	Tuesday, 11th March
2.	Sarnia	Tuesday, 18th "
3.	London	Monday, 24th "
4.	Chatham	Monday, 7th April
5.	St. Thomas	Tuesday, 15th "
6.	Goderich	Monday, 12st "
7.	Walkerton	Monday, 28th "

HOME CIRCUIT.

THE HON. MR. JUSTICE GALT.

1.	Brampton	Tuesday, 11th March
2.	Toronto	Wednesday, 26th "

CHANCERY SPRING SITTINGS, 1873.

HOME CIRCUIT.

THE HON. THE CHANCELLOR.

1.	St. Catharines	Wed'day, 19th March
2.	Guelph	Monday, 24th "
3.	Hamilton	Tuesday, 1st April
4.	Barrie	Wednesday, 9th "
5.	Brantford	Wednesday, 16th "
6.	Simcoe	Wednesday, 23rd "
7.	Owen Sound	Wednesday, 30th "
8.	Whitby	Wednesday, 7th May

EASTERN CIRCUIT.

THE HON. VICE-CHANCELLOR STRONG.

1.	Kingston	Tuesday, 25th March
2.	Belleville	Tuesday, 1st April
3.	Cobourg	Monday, 7th "
4.	Peterborough	Monday, 14th "
5.	Lindsay	Thursday, 17th "
6.	Brockville	Wednesday, 23rd April
7.	Cornwall	Tuesday, 29th "
8.	Ottawa	Tuesday, 6th May

WESTERN CIRCUIT.

THE HON. VICE-CHANCELLOR BLAKE.

1.	Walkerton	Tuesday, 8th April
2.	Sarnia	Tuesday, 15th "
3.	Sandwich	Friday, 18th "
4.	Chatham	Wednesday, 23rd April
5.	Woodstock	Tuesday, 6th May
6.	Stratford	Monday, 12th "
7.	Goderich	Friday, 16th "
8.	London	Wednesday, 21st May

THE HON. VICE-CHANCELLOR STRONG.

Toronto ..... Monday, 10th March

APPOINTMENTS TO OFFICE.

ATTORNEY GENERAL FOR ONTARIO.

Hon. OLIVER MOWAT, to be Attorney-General for the Province of Ontario, in the place and stead of Hon. Adam Crooks resigned.

TREASURER OF ONTARIO.

Hon. ADAM CROOKS, to be the Treasurer of the Province of Ontario, in the place and stead of Hon. Alex. Mackenzie resigned.

PROVINCIAL SECRETARY.

Hon. TIMOTHY BLAIR PARDEE, to be Secretary and Registrar of the Province of Ontario, in the place and stead of Hon. Peter Gow resigned.

VICE-CHANCELLOR.

SAMUEL HUME BLAKE, of the City of Toronto, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-Law, to be one of the Vice-Chancellors of the Court of Chancery of the Province of Ontario, vice the Honourable Oliver Mowat resigned. (Gazetted Nov. 12th, 1872.)

MASTER IN ORDINARY IN CHANCERY.

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, Barrister-at-Law, in the room and stead of John Alexander Boyd, Esquire, resigned. (Gazetted 21st December, 1872.)

REFEREE IN CHAMBERS.

GEORGE SMITH HOLMESTED, of the City of Toronto, Esquire, Barrister-at-Law, in the room and stead of Thomas Wardlaw Taylor, Esquire, resigned. (Gazetted 21st Dec., 1872.)

DEPUTY JUDGE.

ROBERT P. JELLETT, of the Town of Belleville, in the Province of Ontario, and of Osgoode Hall, Esq., to be Deputy Judge of the County Court of the County of Prince Edward. (Gazetted December 6th, 1872.)

JUNIOR JUDGES.

ISAAC FRANCIS TOMS, of the Town of Goderich, in the County of Huron, in the Province of Ontario, Esq., and of Osgoode Hall, Barrister-at-Law, to be Junior Judge of the said County of Huron, in the Province of Ontario. (Gazetted Dec. 7th, 1872.)

JOHN ANDERSON ARDAGH, of the Town of Barrie in the Province of Ontario, and of the Osgoode Hall, Esquire, Barrister-at-Law, to be the Junior Judge of the County Court of the County of Simcoe in the Province of Ontario. (Gazetted 12th November, 1872.)

SHERIFF.

JAMES ALBRO HALL, of the Town of Peterborough, Esquire, to be Sheriff of and for the County of Peterborough, in the room and stead of James Hall, Esquire resigned. (Gazetted Nov. 9th, 1872.)

REGISTRARS.

SAMUEL LOUNT, of the Town of Barrie, Esquire, of and for the County of Simcoe, in the room and stead of George Lount, Esquire, resigned. (Gazetted November 23th, 1872.)

JAMES WALLACE ASKIN, of the Town of Sandwich, Esquire, of and for the County of Essex, in the room and stead of JOHN A. ASKIN, Esquire, resigned. (Gazetted 7th December, 1872.)

QUEEN'S COUNSEL.

DANIEL McMICHAEL, of Toronto, Esquire.

CHRISTOPHER SALMON PATTERSON, of Toronto.

EDMUND BURKE WOOD, of Brantford.

JOHN T. ANDERSON, of Toronto.

THOMAS MOSS, of Toronto, (Gazetted December 18th, 1872.)

ROBERT STUART WOODS, of Chatham, Esquire.

JAMES A. HENDERSON, of Kingston, D.C.L.

D'ARCY BOULTON, of Toronto. "

ALEXANDER LEITH, of Toronto. "

THOMAS ROBERTSON, of Dundas. "

The Hon. JOHN O'CONNOR, of Ottawa.

HECTOR CAMERON, of Toronto, Esquire.

JAMES BEATY, Junior, of Toronto, "

GEORGE A. DREW, of Elora, "

JAMES MACLENNAN, of Toronto, "

DAVID TISDALE, of Toronto, "

DALTON McCARTHY, of Toronto, "

HEWITT BERNARD, of Ottawa, Esquire, Deputy of the Minister of Justice. (Gazetted December 18th, 1872.)*

NOTARIES PUBLIC.

WILLIAM FREDERICK WALTER, of the City of Hamilton, Esquire, Barrister-at-Law, and HARRY EDMONDS FEATHERSTON CASTON, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted Oct. 19th, 1872.)

ALLAN CASSELS, of the City of Toronto, and JAMES WILLIAM SHARPE, of the Village of Dresden, Esquires, Barristers-at-Laws and ERNEAST SEEBER, of the Village of Neustadt, Esquire. (Gazetted October 26th, 1872.)

HERBERT CHARLES GWYN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted November 22nd, 1872.)

WILLIAM HORTON, of the City of London, Esquire, Barrister-at-Law, and JAMES GOWANS, of the Town of Sarnia, Gentleman, Attorney-at-Law. (Gazetted Nov, 9th, 1872.

DUNCAN MORRISON, of the Town of Owen Sound, Esquire, Barrister-at-Law. (Gazetted November 23rd, 1872.)

COLIN McDOUGALL, of the Town of St. Thomas, Esquire, Barrister-at-Law. (Gazetted Nov. 20th, 1872.)

JOHN MATHESON, of the Town of Woodstock, Gentleman Attorney-at-Law and CLAUDIUS TIDEY, of the Village of Norwich, Gentleman. (Gazetted December 14th, 1872.

ISRAEL NEWNHAM WINSTANLEY, of the Village of Fergus, Esquire, Barrister-at-Law; WILLIAM F. ELLIS, of the Town of St. Thomas; THEOPHILUS HENRY ALEXIS BEQUE, of the Town of Dundas, and THOMAS WELLESLEY McMURRAY, of the Village of Ancaster, Gentleman, Attornies-at-Law. (Gazetted Dec. 21st, 1872.)

ASSOCIATE CORONERS.

ARCHIBALD CONNELL SINCLAIR, of the Village of Port Elgin, Esquire, M.D., for the County of Bruce.

SAMUEL BRIDGLAND, of the Village of Bracebridge, Esquire, M.D., for the Counties of Simcoe and Victoria. (Gazetted Oct. 19th, 1872.)

WILLIAM REAR, of the Village of Oakwood, Esquire, M.D., for the County of Victoria. (Gazetted November 2nd, 1872.)

WILLIAM FREEMAN, of the Village of Georgetown, Esquire, M.D., for the County of Halton. (Gazetted Nov. 16th, 1872.)

J. A. MACDONELL, of the Village of Thunder Bay, Esquire, M.D., for the Provisional Judicial District of Algoma. (Gazetted Nov. 23rd, 1872.)

WILLIAM COBURN, of the Village of Oshawa, Esq., M. D. for the County of Ontario. CHRISTOPHER KNOWLSON, of the Village of Omemee, Esquire, for the County of Victoria. (Gazetted Dec. 14th, 1872.)

JAMES TAYLOR, of the Village of Para, Esquire, M. D., for the County of Bruce. (Gazetted Dec. 21st, 1872.)

JOHN BARNHART, of the Town of Owen Sound, Esquire, M.D., in and for the County of Grey.

EDWARD OLIVER, of the Village of Mooretown, Esquire, M.D., in and for the County of Lambton. (Gazetted 7th December, 1872.)

* Many of our readers will remember that Mr. Bernard, when engaged in the practice of his profession at Barrie, in partnership with the Hon. James Patton, Q. C., was one of those who contributed largely to the success of the early volumes of the *Upper Canada Law Journal*. We now congratulate him upon his promotion, so well bestowed upon one of his extensive legal attainment, and who holds an office of such great importance and responsibility.—Eds. L. J.

sion, probably, required so much varied knowledge as that of the law. They were liable every one to have submitted to them most diverse questions. One day it might be a surgical case, another that of a mill, and another one of complicated accounts; indeed the variety was so great that it was difficult to say where one's knowledge ought to end. Mr. Cameron proceeded to show how that lack of knowledge may have caused a strong point in a case to be overlooked; or led to a point being argued that was better left alone; and instanced cases where men had evinced ignorance in speaking of a vegetable poison as a mineral one, and on points of anatomy. He spoke of suits which had been lost through ignorance of mechanics; of the different effect of water on an over-shot and under-shot wheel. He believed that no man would go far astray if he devoted six months to a course of lectures on anatomy, and a certain period to book-keeping. The next point insisted on was that a practitioner at the Bar should never be driven from a course he had decided on, simply because his client did not approve of it, nor be too anxious to make well better, and instanced the cases of *Staunton* v. *Weller*, and that of a forged deed. In the former an action was entered for recovery of damages from a stage coach proprietor. A non-suit had been moved for when the defendant desired the driver should be put into the witness box. He was called and proved that in the case of the accident he acted on the judgment of a passenger at his side rather than his own, whereupon the judge held him responsible for the accident and a verdict was returned for plaintiff. A two-fold lesson was inculcated by this illustration. Mr. Cameron next commended the practice of patience and perseverance and showed the value of them by instancing the case of some deeds which had been lost in Canada in the war time of 1812, and which after years and years of search all over the world had been discovered in the possession of a high official who had supposed them to be burnt. He next proceeded to notice the practice of Criminal Law; and said that that was attended with far more difficulties than was generally supposed. It was thought that anyone could take up a defence in a Criminal Case. This was a great mistake. It was a very serious responsibility that might involve the character or the life of the client. He would advise them for one thing never to allow a client to tell them he was guilty, for they would thereby encumber themselves with a weight hard to bear. It was their duty always to conduct the case of a client as if they were simply his mouthpiece, but it was unwise to begin with a knowledge that might prove embarrassing. In the whole course of his professional career he had never had to defend more than one who had told him he was guilty, and that one was acquitted. He then mentioned the case of an artilleryman who shot his sweetheart, and detailed a remarkable chain of circumstantial evidence in the prisoner's favor which resulted in his acquittal. There were other things they would also have to remember. It was often said Mr. A. B. or Mr. C. D. had the ear of the Court. If they examined they would find there was a reason for that. Some men made it a practice not to state a case fairly and this often prejudiced the court against them. There was no favor conceded to any particular lawyer, but the fact was rather that A. B. or C. D. was perfectly reliable; and they themselves would find that there was nothing more proper or profitable than to place a case fairly and honestly before the court. Their profession was a liberal one in every way and an honorable one; it bore more weight of responsibility than any other. They were entrusted with secrets which, if known, would be most disastrous. They were treated with the most implicit confidence; and as long as that was the case they could not but hope that they would urge on every one coming into it, to maintain that honour which had been the glory of the land from which they had sprung, and which should be the glory of this land also. He hoped that the high standard that had been maintained in this country at the Bar and on the Bench would still be kept up; and they only claimed that, with a more extensive field, they would have in the rising men, not only those who would maintain the glory of the past, but would add a lustre to it. They had every educational advantage, and he impressed on them the necessity of their availing themselves of it. In his remarks he had kept himself from scientific questions because these would be brought under notice in the course of lectures then begun. He concluded by speaking in commendatory terms of the gentlemen who were joined with him in conducting the affairs of the Society and the education of the students.

Mr. Cameron concluded a long, practical, useful and eloquent discourse, extending over an hour and a half, amid the most enthusiastic applause. The attendance of both students and practitioners was very large, the lecture-hall and passages being crowded.

ADMINISTRATION OF JUSTICE.

We have just received a copy of the Bill submitted to the Provincial Legislature by Hon. Attorney-General Mowat, entitled "An act for the better administration of Justice in Ontario."

The Bill, though brief, will effect most material alterations in our judicial system, and it has evidently been prepared with great care. Without committing ourselves to all its provisions, we may say that the hasty examination we have made has impressed us most favorably with the measure, and we commend it to the fair and candid consideration of every member of the profession in the legislature.

When the *Law Journal* was commenced nearly twenty years ago, it was announced to be wholly and exclusively a legal publication, and we added "it is almost needless to say we can have, editorially, no politics." Perhaps it is too much to hope that lawyers in the House can approach the consideration of legal measures submitted by their political opponents in the same spirit—though in the best interests of law reform, we would it were possible—and the Attorney-General, we think, may reasonably claim a fair and candid consideration of his measure. No doubt *he* will be prepared to listen with candour to any suggestions that may be offered, or to any objections that may be urged by those competent to form an opinion on both sides of the House. Nor ought the fact that it is in his power to secure a majority for any legal measure the Government may submit, render him impatient of fair discussion on the merits, or intolerant of suggestions for improvement in the Bill.

Few lawyers are insensible to the anomaly which the distinction between "Law" and "Equity" produces in our system of jurisprudence; different courts of Justice, administering justice on different, and sometimes antagonistic principles—rights held entitled to consideration and protection in one court, not acknowledged in the other. The abstract truth will be denied by none, that in whatever courts justice may be administered, uniform principles should prevail—principles most consonant to rational justice. How this may best be accomplished has been earnestly debated for more than half a century in England, and of late years the subject has engaged the attention of thinking men in Canada. One mode has been suggested, "The fusion of Law and Equity," as it has been called—fusion immediate and complete. Another mode, by cautious, gradual improvements, commencing with the most salient points, removing the anomalies, imperfections and defects in each system, and bringing them into unison—making in the end Law and Equity one and indivisible.

The first plan was supposed to find favour with a former Government, and perhaps there is even one gentlemen in the present Government who would not hesitate to exercise at once all the absolute and despotic power the Prætor possessed under the Roman constitution, and in one brief clause dethrone and banish the *Common Law* into the land of forgetfulness, placing the *genius of Chancery* in its stead. However that may be, Mr. Mowat as the head of the Government seems to have adopted the latter and safer plan; the even tenor of the magisterial pursuits, with its responsibilities, has taught him doubtless to distinguish between law reform and revolution; and broader and better views of the requirements of an enlightened jurisprudence have shown him that to subvert with one blow a system which has grown with our growth, and which is so intimately interlaced with our relations and dealings, would be little short of madness. In a word, the head of the Ontario Government recognizes the fact that to destroy one

system without first building up another on a plan better adjusted to the requirements of substantial justice, would not be the act of a statesman or a jurist. He doubtless felt that so to build would be a work so vast and important as to require absolute and entire devotion to the subject for a longer period than any Government or any member of it could give. The Attorney-General has therefore taken up certain defects, and though they are few in number, the question with us is whether he has not possibly attempted too much at first.

We have only time to do more than make a brief reference to some of the clauses in this Bill.

The first section lays down a rule dimly recognised as the law exists, but sound in principle, and which, if carried out, must prove beneficial. No doubt this section is intended to be a key to the whole statute, and subsequent clauses would be read having regard to this legislative direction.

Section 2 requires much consideration. "A purely money demand" is leaving a good deal to interpretation, and may admit of much difference of opinion in the application of the terms to particular cases. We are not now prepared to say that a better term could be employed if designed to be used in the broadest and most comprehensive sense, and it is difficult to understand how such cases should have gradually passed to the exclusive jurisdiction of a Court of Equity. The rigid rule as to judgments and as to parties in the Common Law Courts was no doubt the great barrier. Section 8, in particular, seems a necessary complement to section 2; a careful examination of the clause may suggest an alteration in the language. The principle of the proposed enactment we approve.

Section 3. This enlargement of the equitable plea, &c., has our entire approval, and we think it is so framed that its value cannot be impaired by a narrowing-down process, which to a great extent curtailed the benefit of the similar provision recommended by the framers of the English C. L. P. Act.

Sections 4, 5, 6, and 7 relate to equitable defences, &c., in ejectment, and with respect to them we should like to hear some explanation before expressing an opinion beyond this, that the principle of allowing equitable defences to avoid the necessity of a suit in Chancery ought to be extended to actions of ejectment. A demurer to a notice is a new feature, and in considering these clauses it ought to be borne in mind, that the notice is no part of the record. To be in keeping with the proposed change the notice or its equivalent should form an integral part of the record.

Without committing ourselves to details we may say that the proposed enactments in sections 9 and 10 are in our opinion desirable and necessary. They aim at a tangible evil, a standing reproach in our system of administration, an evil against which foreign jurists have levelled many a shaft. It is absurd when a suitor comes to a Court of *Justice* to obtain justice that he should be told "we cannot give you the article here, begin again in another Court;" "but," the suitor says, "this is a Court of Justice, render to me my due." "No, you cannot have (e. g.) equitable justice here, go next door." We are aware that the argument pushed would lead to a larger measure of relief than Mr. Mowat proposes, but that in good time; the clause is a step in the right direction. Sections 32 to 34 are provisions in the same connection.

Sections 11 to 15 relate mostly to procedure, and we shall not now pause to examine them.

The 16th, 17th and 18th sections relate to the mode of trial of issues of fact and will not very materially alter the present law. In our judgment they do

not go far enough, and leave room also for doubt when read with similar clauses in the Law Reform Act. We should like the rule to be that all issues of fact should be tried by a Judge, the exception being only in cases of libel and slander, and in cases where, upon applications made before trial, the Court or Judge saw fit to direct the issues to be tried by a jury. If the trial by jury in civil cases were thus dispensed with there would be no occasion for section 20, but while trial by jury exists there ought to be some means of keeping juries within their proper sphere. The theory of our mode of trial at Nisi Prius is that the jury determine the facts, the Judge declaring the law. But those familiar with procedure know how difficult it is to confine juries to their sole duties, how often they go beyond them and usurp the functions of the Judge. They may or may not accept the law as laid down by the Bench, and there is always a difficulty, unless the jury will answer questions put to them, which they may refuse to do as the law stands, and insist on finding a general verdict. In actions for malicious arrest, false imprisonment, and actions by and against corporations, &c., the evil is very marked. The 20th section is apparently designed to remedy this by requiring the jury to give a special verdict. Our impression is that it will be better to provide that distinct questions should be framed beforehand and submitted to the jury, something similar to the plan in the Indian Code of Procedure. No doubt under section 20 the Judge could at Nisi Prius frame and submit to the jury questions in determination of the issues, and require the jury to answer them, but this in complicated cases is not always an easy task, and it would seem much better to have them prepared *deliberately* before-hand. Strong opinions have been expressed as to the propriety of this change both *pro* and *con*. We shall refer to these conflicting views on a future occasion.

The 21st section is calculated to save an unnecessary waste of judicial strength and the avoidance of delay.

The clauses for the examination of parties, &c., we do not stay to examine in detail, but recognize their great value, and similar powers have worked well in Chancery procedure.

The 36th and subsequent sections for assisting a party to obtain the fruit of his judgment or decree, may remove some difficulties that now exist, and as provisions in aid will be found valuable in plain cases where there is no contest. It is not, we apprehend, intended by this section, nor would it be wise that judges should, in all cases brought before them under it, summarily dispose of those many doubtful and difficult questions which arise where sales are impeached on the ground of a fraudulent intent to defeat creditors. It very frequently happens, and notably so in this class of cases, that the truth cannot be reached without having the witnesses and parties brought face to face with each other and subjected to a very searching cross-examination. Whilst, therefore, this section will be useful in cases where the fraud is so palpable as not to leave any room for doubt, and where there are no other complicating circumstances, it is not likely that judges will very freely exercise the large powers proposed to be given to them. We presume there would be an appeal from any decision under this section as in other cases, but it would be well to provide that on an appeal a direction might be given for the trial of the disputed point on an issue or by bill under section 38.

When the Bill goes into committee the language of all these clauses will no doubt be carefully examined and any necessary alterations and additions made.

The 45th section will prevent County Court cases being carried out of the Court in which they are instituted, often to the

detriment of the suitors proper in the Superior Courts.

There will be some trouble in practically carrying out the theory laid down in section 46. A difficulty will at once arise as to how a taxing officer in one Court is to tell what the costs of the suit would have been if brought in another Court, having entirely different machinery. This is a matter which will require consideration and amendment.

The 47th and 48th sections meet our unqualified approval. "The advancement of justice, and the prevention and redress of fraud," in other words, substantial justice, ought to be paramount to mere technical rules, and the very ample powers of amendment here given will greatly aid the Courts in the administration of justice.

The 54th and 55th sections put a very important jurisdiction upon a proper footing. The power to try criminal cases by a judge without a jury was conferred by an Act of Canada introduced by the late Hon. J. Sandfield Macdonald, and that it has worked well and satisfactorily, we shall on a future occasion show. The Dominion Parliament could only confer the jurisdiction. Very nearly what is proposed to be done by this Bill, we happen to know that the first Premier of Ontario intended to submit to the Legislature. We do not by this remark desire to detract from the credit due to Mr. Mowat as the framer of this provision or to suggest that he was aware of Mr. Macdonald's intention: far from it,—but it could not fail to engage his intention that what at first was regarded as a doubtful experiment had proved a great success, as shewn by the very large number of persons charged with crime who accepted the jurisdiction, the proportion outside of the cities being over four-fifths of the whole number of persons committed for trial. The proposed enactment will so far as the Legislature of Ontario can do it remedy the main imperfections, but further legislation in the Dominion will be required to complete the design and give the tribunals *all* the powers and facilities that a Criminal Court should possess.

We have given all our available space to this brief notice of the leading provisions in this most important Bill, and whatever difference of opinion may prevail as to some of the provisions—the object the Bill aims at, the moderate range and character of the proposed enactments, and the able and careful manner in which it is framed, claim for it, we repeat, a grave and candid consideration.

We would in conclusion suggest that the Act should not come into force for some time to be limited by it. This would give time for practitioners to see it and understand it before being called upon to act under its provisions.

The Bill reads as follows:—

Her Majesty, &c., enacts as follows:—

LAW AND EQUITY COURTS.

1. The courts of law and equity shall be, as far as possible, auxiliary to one another respectively, for the more speedy convenient and inexpensive administration of justice in every case.

EQUITABLE POWERS OF LAW COURTS.

2. Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only, and no plea, demurrer or other objection on the ground that the plaintiff's proper remedy is in the Court of Chancery, shall be allowed in such action: but the court shall have the discretionary power hereinafter mentioned to transfer equity matters to the Court of Chancery when the ends of justice so require.

3. Any party to an action at law may, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle such party to an absolute, perpetual and unconditional injunction in a court of equity, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts: and such plea or other subsequent pleading shall begin with a statement that it is on equitable grounds.

4. Any defendant in an action of ejectment, or any other person not named in the writ, who has obtained leave to appear and defend, may, in addition to the notice denying the plaintiff's title, and asserting title in himself, state by way of defence any facts which entitle him on equitable grounds to retain possession; and such statement shall begin with the words "For a defence on equitable grounds."

5. Such defence on equitable grounds may be set up as to the whole of the property mentioned in the writ, or may be limited to part thereof.

6. When a defence on equitable grounds is set up under the two preceding sections, the plaintiff may, within the same time as he may now reply to a plea on equitable grounds in any other section, file a statement, setting up any facts which avoid such defence on equitable grounds; and such statement shall begin with the words "For a reply to the defendant's statement on equitable grounds."

7. The plaintiff, instead of filing a statement under the foregoing section, may demur to the statement of facts filed by the defendant, or he may file a statement in reply as to part, and demur as to other part.

8. For the purpose of carrying into effect the objects of this Act, and for causing complete and final justice to be done in all matters in question in any action at law, the court or a judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require, and may make such rule or order as to adding third persons as parties to any proceeding, striking out parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs, and as to costs, and may direct such enquiries to be made and accounts to be taken, as shall seem reasonable and just; and may as fully dispose of the rights and matters in question as a court of equity could do.

9. In case it appear to a Court of Common Law or a judge thereof, that any equitable question raised in any action or other proceeding at law, cannot be dealt with by a court of law so as to do complete justice between the parties, or may for any other reason be more conveniently dealt with in Chancery, the court or judge may order the action or proceeding to be transferred to the Court of Chancery; and such order of transference may be made by the court or judge *suo sponte*, or upon the application of either party on notice to the other parties interested.

10. When an order is made under the foregoing section the proper officer of the Court of Common Law shall annex together all pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such officer of the Court of Chancery as the order shall direct.

11. When, in the opinion of a Court of Common Law or a judge thereof, it is necessary or proper in any action to take accounts or make enquiries, which cannot so conveniently or properly be taken or made under the existing practice at law, or by the means now available for the said courts, as they might be in Chancery, the court or judge may order such accounts and enquiries to be taken and made by the master or any of the local masters of the Court of Chancery, instead of ordering a transference of the suit generally to the said Court of Chancery.

12. When an order is made under the preceding section, the master to whom the reference is directed shall proceed therein, and all the orders of the Court of Chancery as to the powers of the master, and as to the proceedings in the master's office, shall apply thereto, as if the reference had been made by an order of the Court of Chancery.

13.—[Master's report to be filed and become absolute in fourteen days unless appealed from.]

14. The appeal from a report referred to in the preceding section shall be to a judge in chambers or to the court in term, but when the appeal is taken to the court in term, the notice of appeal shall be returnable not later than the fourth day of the term next after the filing of the report.

15. [On transfer from a county court, and reference costs to taxed on lower scale.]

16. [Equitable issues to be tried without a jury, except on judge's order for a jury.]

17. In sections of libel, slander, criminal conversation, seduction, malicious arrest, and false imprisonment, all questions which might heretofore have been tried by a jury, shall be tried by a jury, unless the parties in person or by their attorneys or counsel waive such trial.

18. All other legal issues shall be tried as heretofore; but the court in which the action or proceeding is pending, or a judge thereof, may upon application being made before trial, or the presiding judge may, upon the trial, direct that the issue or issues shall be tried and assessed without the intervention of a jury.

19. When in any action or other proceeding at law both legal and equitable issues are raised, such issues shall be tried at the same time unless

the court or a judge thereof, or the judge presiding at the trial shall otherwise direct.

20. Upon any trial by a jury where the court or a presiding judge shall otherwise direct, it shall not be lawful for such jury to give a general verdict, and it shall be the duty of such jury to give a special verdict if the court or presiding judge shall so direct: but this section shall not apply to actions of libel.

21. The judges of each of the Superior Courts of Common Law may sit separately, or two may sit separately from the third, either at the same time or at different times, for the hearing and disposing of such matters and the transaction of such business as may from time to time in that behalf be directed by general or other rules or orders of the court: and the judgments, decrees, rules, and orders made by a single judge, or by two judges, in such case, shall have the force and effect of, and be deemed for all purposes to be the judgments, decrees, rules and orders of the court; and the judgments, decrees, rules and orders of any judge, or of any two judges sitting separately as authorized by this Act, shall be deemed to be the judgments, decrees, rules and orders of the court in which the action or other proceeding may be pending, although the judge or judges pronouncing or making the same may not be a judge or judges of such court; but such judgments, decrees, rules and orders shall be subject to appeal or rehearing before the full court, in term, or otherwise, in such cases as the court, by general orders or rules or otherwise, from time to time direct or appoints; and any judge, or any two judges so sitting separately shall have all the powers of the full court, subject to any general orders or rules in that behalf. But when any one or two of the judges before the passing of this Act could have sat as and for the full court, he or they may and shall under the like circumstances continue to do so notwithstanding this Act.

22. The proceedings before two of the judges, or any one of the judges sitting separately, as aforesaid, shall shew on their face in the motion paper, or in any judgment, decree, rule or order to be given or made, that the business was carried on by two, or by one only of the judges, as follows: "In [*styling the court*] Before Justice [*naming the Judge, or, if before two Judges* "Before and Justices," *naming them.*]

23. [Decision of questions of fact or law may be reserved at trial.]

Evidence, Examinations.

24. Any party to an action at law, whether plaintiff or defendant, may at any time after such action is at issue obtain an order for the oral examination, upon oath, before a judge or any other person specially named by the court or a judge, of any party adverse in point of interest, or in case of a body corporate of any of the officers of such body corporate, touching the matters in question in the action; and any party or officer examined may be further examined on his own behalf, or on behalf of the body corporate of which he is an officer, in relation to any matter respecting which he has been examined in chief; and when one of several plaintiffs or defendants has been examined any other plaintiff or defendant united in interest may be examined in his own behalf or on behalf of those united with him in interest, to the same extent as the party examined: Provided that such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period except by leave of the court or a judge; and for the purposes of the preceding clause when the officer of a body corporate has been so examined as aforesaid on behalf of such body corporate, such body corporate shall be deemed to be fully represented by such officer.

25. Any party to be examined orally under the provisions of this Act shall be so examined by the judge or other person specially named in the order for examination; and such examination shall take place in the presence of the parties, their counsel, attorneys, or agents; and the party so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law on a trial at nisi prius, or in chancery at the hearing of a cause.

26. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative; and when completed shall be read over to the party examined, and shall be signed by him in the presence of the parties, or of such of them as may think fit to attend: Provided always, that, in case the party examined shall refuse or be unable to sign the said depositions, then the examiner shall sign the same; and such examiner may upon every examination state any special matter to the court if he shall think fit: Provided also that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear to be any special reason for so doing, and any question or questions which may be objected

to shall at the request of either party be noticed or referred to by the examiner in or upon the depositions; and he shall state his opinion thereon to the counsel, attorneys, agents, or parties, and if requested by either party he shall on the face of the depositions refer to such statement.

27. When the examination before the examiner shall have been concluded, the original depositions authenticated by the signature of such examiner shall be returned and kept in like manner as depositions are directed to be returned and kept by the one hundred and ninety-third section of the Common Law Procedure Act.

28. The sheriff, gaoler, or other officer having the custody of any prisoner may take such prisoner for examination under the authority of this Act, by virtue of a writ of *habeas corpus* to be issued for that purpose, which writ may be issued by the court or judge under such circumstances as such court or judge may by law issue a writ of *habeas corpus ad testificandum*.

29. The order for the examination of a party adverse in point of interest, or of the officer of a corporation, referred to in the twenty-fourth section of this Act, shall be granted as of course upon the production, by the party purposing to examine of an affidavit of such party, or of his attorney or agent, stating that the deponent believes that the party purposing to examine, whether plaintiff or defendant, will derive material benefit in the action or other proceeding from such examination, that there is good cause of action (or of defence) upon the merits, and (if the application be made on the part of the defendant) that the examination is not sought for the purpose of delay.

30. Any party or person refusing or neglecting to attend at the time and place appointed for his examination, or refusing to be sworn or to answer any lawful question put to him by the examiner, or by any party entitled so to do, or his counsel, attorney or agent, shall be deemed guilty of a contempt of court, and proceedings may be forthwith had by attachment: Provided always, that if the party under examination shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto shall be taken down by the examiner and transmitted by him to the office of the court to be there filed; and the validity of such demurrer or objection shall be decided by the court or a judge; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court or judge.

31. The distinction between local and transitory actions at law is hereby abolished, and the plaintiff may sue out the writ for the commencement of any action from any such office as under the practice heretofore in force he might have sued out such writ in a transitory action.

JURISDICTION OF CHANCERY IN LEGAL MATTERS.

32. Where a suit is instituted, or where a petition is filed in the Court of Chancery for the purpose of establishing the title of the plaintiff to any real property, no objection to such suit or proceeding shall be allowed upon the ground that such plaintiff should first have sued at law, or would have an adequate and complete remedy at law by action of ejectment or otherwise; and if it shall appear upon the hearing or other determination of such suit or proceeding that the plaintiff or petitioner is entitled to the possession of such real property, he may obtain an order against the defendant or respondent for the delivery of such possession, and writs of execution shall issue accordingly.

33. No objection shall be allowed on demurrer or upon the hearing of any cause in the Court of Chancery, upon the ground that the subject matter of the suit or other proceeding is exclusively or properly cognizable in a court of law: but in case at any stage of a cause in chancery it appear to the court or a judge thereof that the suit may for any reason be more conveniently, expeditiously, or inexpensively carried on or dealt with in a court of law, the Court of Chancery or a judge thereof may order the suit to be transferred to such one of the courts of common law as the said court or judge may think proper; and such order may be made by such court or judge *sua sponte*, or upon the application of either party to the court or judge on notice to the other parties interested.

34. When an order is made under the foregoing section the proper offices of the Court of Chancery shall annex together all the pleadings and papers filed with him, and transmit the same together with the order of transference or a copy thereof, to such office of the court of common law as the order shall direct.

LAW AND EQUITY.

35. When a transfer has been made under either the ninth section or the thirty-third section of this Act, the suit, action or other proceeding shall thereafter proceed in the court to which it has been transferred; and the judges of such court and the officers thereof shall have the same powers and perform the same duties in relation

thereto, and the practice and orders of such court shall in all respects (or as nearly as may be) apply as if the suit had been originally instituted as an action, suit or proceeding in such court; but no further or other pleadings shall be necessary than the original pleadings in the court from which such suit, action or proceeding was transferred, unless specially ordered by the court or judge.

FRAUDULENT CONVEYANCES.

36. Where a judgment creditor or a person entitled to money under a rule decree or order at law or in chancery, alleges that the debtor has made a conveyance of his lands which is void, as being made to delay, hinder or defraud creditors, or a creditor, it shall not be necessary to file any bill in equity for the purpose of setting aside such conveyance, but the court or a judge in chambers may, upon the application of the judgment creditor, call upon the judgment debtor and the persons to whom the conveyance has been made, or who have acquired any interest thereunder, to show cause why the lands embraced therein, or a competent part thereof, should not be sold to realize the amount to be levied under the execution.

EXECUTION AGAINST EQUITABLE ESTATES.

37. When any judgment creditor in an action at law or a person entitled under a rule decree or order as aforesaid, alleges that the debtor is entitled to or has an interest in any land which cannot at present be sold under legal process, but could be rendered available in equity for satisfaction of the debt, the court or a judge in chambers may, upon the application of the creditor, call upon the debtor and the trustee or other person having the legal estate in the land in question, to shew cause why the said land or the interest of the debtor therein, or a competent part of the said land, should not be sold to realize the amount to be levied under the execution.

38. Upon any application under either of the two preceding sections, such proceedings shall be had, either in a summary way or by the trial of an issue, or by inquiry before an officer of the court, or under the eleventh section of this Act, or by a bill in chancery, or otherwise, as the court or judge may deem necessary or convenient for the purpose of ascertaining the truth of the matters in question, and whether the lands or the debtor's interest therein are in equity liable for the satisfaction of the execution.

39. Where in a summary way or upon the trial of any issue, or as the result of any enquiries under the three preceding sections, any land or the interest of any debtor therein, is found liable to be sold, an order shall be made by the court or judge declaring what land or what interest therein is liable to be sold; and such order shall be a sufficient warrant to the proper sheriff or other officer to proceed with the sale of the said land and interest.

40. The sale and conveyance by the sheriff, in pursuance of such order, shall have the same effect as such sale and conveyance would heretofore have had if the land so sold had been saleable under ordinary legal process.

INTERPLEADER.

41. In cases of proceedings for interpleader by reason of any levy or seizure by a sheriff, and in case such sheriff have more than one writ at the suit or instance of different persons against the same property, it shall not be necessary for the sheriff to make a separate application on each writ, or in each cause; but he may make one application, and may make all the persons who are execution creditors parties to said application for an interpleader; and the court, or judge before whom the application is made, shall take such proceedings, and make such order thereon and therein, as if a separate application had been made upon and in respect of each writ.

42. In case there are writs from several courts, including one or more of the superior courts, against the same goods, and whether at the suit or instance of the same plaintiff, or of different plaintiffs, the application for such interpleader shall be made to the superior court, or to one of the superior courts, or to one of the judges thereof, and such court or judge shall dispose of the whole matter, as if all of the writs against the goods had been issued from the said court. And in such case the county court or division court shall have no cognizance of or jurisdiction whatever in the matter.

43. In any such case as in the next preceding section mentioned, the superior court or judge thereof, shall make such order with respect to staying proceedings on the several writs, or with respect to directing a sale of the goods or property in question as may be necessary, and with respect to the final disposition or order to be made as to the goods or the proceeds thereof, and in all other matters whatsoever, as fully as if all the writs had been issued from the said court.

44. In all cases where specific goods, chattels, deeds, securities, or valuable papers, or other articles of the like kind, are demanded in detinue, and the plaintiff has judgment to recover the same or their value, the court or any judge

thereof shall, at the request of the plaintiff, where a recovery or delivery of the property in specie is desired, direct a writ of execution to issue on the judgment commanding the defendants specifically to deliver up forthwith the property demanded, and, in case of refusal, that the defendant be arrested and detained in prison until he complies with the terms of the writ, and also that the goods and chattels of the defendant to double the value of the property in question be taken and kept until the further order of the court to insure or enforce obedience to the writ.

COUNTY COURTS.

45. All issues of fact and assessment of damages in actions in any county court may be tried and assessed at the sittings of assize and *nisi prius* for any county other than that in which the venue is laid, upon an order being obtained for that purpose; and such order may be granted upon similar grounds to those upon which an order changing the place of trial would be granted in the Superior Courts of Common Law.

46. In no event shall any master, clerk, or other taxing officer, tax or allow to any party suing for an equitable right at law, or for a legal right in equity, nor shall such party be entitled to recover by reason thereof, any further or additional costs than would have been taxed, or allowed, or recoverable if the equitable right had been sued for in equity, or the legal right had been sued for at law; and the opposite party shall be entitled, without any order for that purpose, to set off against the costs of the party suing as aforesaid, the additional costs, if any, incurred by such opposite party, through the change of jurisdiction.

INFORMALITIES AND AMENDMENTS.

47. No proceeding either at law or in equity shall be defeated by any formal objection.

48. [Amendments may be made at any time or in any manner to secure justice.]

49. [Powers to the judges to make general rules and orders.]

50. [A fourth court of assize, &c., in the County of York to be held between Easter term and 1st of July.]

51. The sittings of the Courts of Assize and Nisi Prius in the County of York may, in the discretion of the said chief justices and judges of the Superior Court of Common Law, be held separate and apart from the Courts of Oyer and Terminer and General Gaol Delivery in the said County, and either on the same or on a different day.

52. [In County of Wentworth a third court of assize, &c., to be held between Michaelmas and Hilary terms.]

53. When the judge of the county court, or the junior or the deputy judge (as the case may be) officiating in the office of county court judge is present, it shall not be necessary, in order to constitute a court or sittings of the general sessions of the peace, or a quorum at any sittings thereof, that any associate or other justice of the peace should be present at such court or sittings.

54. The judge of every county court, or the junior or deputy judge thereof, authorized to act as chairman of the general sessions of the peace for any county, is constituted a court of record for the trial, out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions, and without a jury; and the court so constituted shall have the powers and duties which the Act passed in the session of the Parliament of Canada held in the thirty-second and thirty-third years of Her Majesty's reign, and chaptered thirty-five, purports to give, so far as the Legislature of this Province can give the same; and every judgment, proceeding, cost, matter, or thing had or done under or by virtue of the said Act, shall hereafter be held to be as valid as if the said Act had been an Act of the Legislature of this Province.

55. The court constituted by the preceding section shall be called "The County Judge's Criminal Court" of the county in which the same is held.

56. [Fourth sittings of County Court and General Sessions to be held in County of York on 2nd Tuesday in September.]

57. It shall not be necessary, in any proceedings, to make a judge's order for the payment of costs a rule of court, but writs of execution may be issued, in pursuance of the said order, in the same manner, and shall have the same force and effect as if the same had been issued in pursuance of a rule of court.

58. Section 127 of the Common Law Procedure Act is hereby repealed.

59. This Act may be cited as "The Administration of Justice Act of 1873."

LAW SOCIETY EXAMINATIONS.

We have already published the Rules of the Law School and given other information on that subject. The following table will be found of much practical use to Students and articled Clerks. We may mention that it is generally understood, that in the examination for call, admission, and the intermediate, one half of the maximum number of marks must be obtained to pass; and, to get rid of the oral ordeal, three fourths must be obtained. On oral examinations candidates must obtain at least one-fourth of the number of marks.

The following is the table referred to:—

For Call—Written questions—Friday before Term—10 a.m. to 4 p.m.
" " Viva voce questions—Friday and Saturday before Term—11 a.m.
" " With honors—Saturday before Term—10 a.m.

For Attorneys—Written questions—Thursday before Term—10 a.m. to 4 p.m.
" " Viva voce questions—Thursday, Friday, and Saturday—11 a.m. Number of questions from 10 to 15 by each Examiner on written Examinations.

Intermediate—Written questions—Tuesday before Term—10 a.m. to 3 p.m. From 7 to 10 questions by each Examiner.
" " Viva voce questions—Wednesday before Term—11 a.m.

Scholarships—2nd Thursday and Friday in Michaelmas Term—10 a.m.

Law School—Monday before Term—10 a.m.—Candidates must obtain the minimum number of marks with each examiner, as well as the minimum of the aggregate number of marks of all the Examiners.

When we look at the above and see the bill of fare provided for those who wish to learn their profession, it can scarcely be said that ample opportunity for doing so is not given.

SELECTIONS.

THE LATE DR. LUSHINGTON.

In our obituary columns appears a notice of a career seldom, if ever equalled in the history of our judicial bench. There is, perhaps, no instance of a Judge who has continued to hold office for a period of forty years, and who, during the whole of that time, was so distinguished for all the greatest qualities that can be possessed by a Judge as was Dr. Lushington. He held many offices; but his great learning, his universal courtesy, his kindness to all, and the unvarying rectitude of his decisions gained him such respect and veneration, that even his political opponents, and they were many and powerful, conceded to him much that would not have been granted to others, and which has proved most advantageous to the country. So great, indeed, was the respect accorded to him, that when it was proposed at his suggestion, to extend the jurisdiction of the court over which he presided, members of both Houses of Parliament not unfrequently suggested giving not merely the jurisdiction asked for, but even larger powers. This was done not only by his political friends, but by his opponents, and hence it is impossible to avoid drawing the conclusion that in so doing they were influenced, not merely by the supposed advantage of the extended jurisdiction, but also by the character of the man to whom they were about to entrust it. Indeed it may be said that to Dr. Lushington's personal influence and character is due the fact that the High Court of Admiralty, as an Instance Court distinguished from a Prize Court, attained the high position in which he left it only six years ago. By the legal Profession he was regarded merely as an eminent Judge, and indeed his life has been so long that his political fame has almost passed into history. It is as a Judge that we shall briefly call attention to his career.

In the year 1828 he was appointed Judge to the Consistory Court, but he principally earned his judicial eminence as Judge of the High Court of Admiralty. When he was first appointed to the latter office he found the jurisdiction of the Court in that restricted condition by which it had been placed by the numer-

ous prohibitions of the Common Law Courts, but very soon afterwards this condition of things was materially altered. The only matters within the jurisdiction of the Instance Court at that time were causes of tort committed on the high seas, causes of salvage, causes of possession, causes of hypothecation or bottomry, and seamen's wages. By the Admiralty Court Act of 1840 (3 & 4 Vict. c. 65) the court acquired jurisdiction over claims of mortgagees when a ship or its proceeds were under arrest of the court; over questions of title arising as to any ship or the proceeds in the registry in any cause; over appeals as to distribution of salvage; over causes of damage, whether arising on the high seas or in the body of a county; over causes of towage; and over causes of necessaries supplied to foreign ships. By this Act there was introduced for the first time the practice of taking evidence *viva voce* before the court or a commissioner. The Act practically placed the court on a level with the Superior Courts at Westminster, giving the Judge all the privileges of the Judges of those courts. The Judge was also empowered to make rules of Court, and it is to this power, afterwards exercised as it was by Dr. Lushington, that we are indebted for the present practice and procedure of the court, which hits the happy medium between the lengthy forms of the Chancery Court and the too short and too technical procedure of the courts of common law, and will probably form the basis of any new system of pleading which may be introduced by the proposed reforms. It must not be supposed, however, that this change in the procedure took place without opposition. It is a fact worthy of remark, that a Judge, who at the time of this change was already at the advanced age of seventy-two years and had been accustomed for thirty-six years to an old-established system, should have carried, in the face of the most determined opposition, extensive reforms in his court. In Nov. 1853 the present learned Registrar of the Admiralty Court, Mr. Rothery, was appointed, and very soon after that date were introduced the changes mentioned. They began in July 1854 by rules of court providing for the sitting of the court on any day it might appoint, and not only during its regular session, so that it became a court sitting from day to day throughout the legal year. A reform more worthy of remark is a rule of 11th Dec. 1854, providing for the collecting of the court fees by means of stamps. This was the first introduction of stamps into the practice of our courts. The reform which created the chief opposition was an order of court of July 1855, approved by the Privy Council in December of that year. This introduced the present system of preliminary acts in collision cases; practically abolished the long and expensive procedure by plea and proof by providing that no witnesses should be examined until the pleadings in a cause should be concluded; allowed the presence of proctors at the examination of the witnesses by the registrar or commissioner, which had not up to that time been permitted; gave power to have the evidence taken down by a shorthand writer; and provided for the printing of all evidence before the hearing of a cause. This order created so much opposition that thirty-two different firms of proctors presented a memorial to the Judge, praying that it might not be enforced. It was enforced, and as a natural sequence, there followed in 1859, the present rules of court, which created still stronger opposition among the proctors, who appealed to the Queen in Council. The question was referred to the Privy Council, and the Proctors were heard on their own behalf, and the Registrar in support of the order, before one of the largest boards that ever sat. The Privy Council affirmed the order, and this was the corner stone of the present practice. The power of the court was still further extended by the Admiiality Court Act 1854 (17 & 18 Vict. c. 78), and it was under this Act that some of the amended rules mentioned were made. In 1859 the court was thrown open to the Profession generally, and in 1861 the jurisdiction was finally extended by 24 Vict. c. 10. That such changes could have been effected whilst any other Judge was in office may be well doubted, and Dr. Lushington is fairly entitled to the credit of having raised the position of his court.

In construing the statutes conferring the new jurisdiction upon the Court of Admirality, and in elucidating the law as administered in that court as an instance court, Dr. Lushington did good service to the public and the Profession. His

judgments, however, in the prize cases which arose during the Russian war attracted much attention by their luminous and elaborate expositions of the principles of law which guide the decisions of those courts both in England, America, and on the Continent. On this subject, however, a very common misapprehension has arisen among the Profession. It is commonly understood, and indeed was stated in the *Times* only the other day that the learned Judge's opinion as to the principles on which such cases should be decided was very different from that entertained by Lord Stowell, and that he considered that neutrals should be treated more leniently than they had been by that great judge, and should not be so indiscriminately condemned as they had been in the beginning of the century. This statement is not quite accurate. It was not Dr. Lushington's opinion that caused a change in the treatment of neutrals, but the opinion of the Privy Council, presided over by the Right Hon. Pemberton Leigh, afterwards Lord Kingsdown. A perusal of Dr. Lushington's judgments in *The Franciska* (Spinks' Prize Cas. 111), and *The Ostsee* (*Ib.* 174), will show that Dr. Lushington held the strongest opinion that he ought to follow the principles laid down by Lord Stowell in every particular, and it was only when these cases went up to the Court of Appeal that the stringent rules hitherto applied were relaxed. This is clearly shown by a judgment of Dr. Lushington in *The Leucade* (Spinks' Prize Cas. 217), where he takes some pains to show that the law laid down in the two former cases by the Privy Council is not as he considered it to be, as based upon Lord Stowell's opinions; whilst at the same time he gives a most unqualified submission to the decisions of the appellate tribunal. He pointed out that very few of Lord Stowell's judgments had ever been reviewed on appeal, and that it was for the appellant court, and not for the court of first instance to lay down finally the principles which should guide his decisions. The appellate court, on the other hand, did not hold itself bound by Lord Stowell, and allowed themselves to be governed by a more liberal feeling towards neutrals. This is the real secret of the difference between the decisions of the Court of Admiralty in its earlier and later stage. There never was any real doubt as to the proper construction of Lord Stowell's opinions.

Another case of great public interest decided by Dr. Lushington was that of the Banda and Kirwee booty. This came before him under the first Admiralty Court Act, and it was the first case in which the principle was laid down that bodies of troops which, although they did not take part in the actual capture, yet contributed to it by being part of, and acting as supporters to, the same army corps, were entitled to participate in its fruits. Among ecclesiastical matters may be mentioned his judgments in *Westerton* v. *Liddell*, delivered in the Consistory Court before he was appointed Dean of Arches, and the celebrated "Essays and Reviews" case decided by him as Dean of Arches.

Dr. Lushington is an extraordinary instance of a man whose powers both of mind and body must have gone through the greatest possible amount of labour throughout a life extending far beyond the ordinary limits, and yet who retained his faculties undisturbed to the very last. It is but the other day that he sat as Master of the Faculties, the only office he retained, and heard and decided a question in a way which many a younger man might envy. England has lost an able and faithful servant, and the judicial Bench one of its most brilliant ornaments. —*The Law Times.*

The decentralization of the English bar, likely to follow the adoption of the second report of the judicature commission, is exciting much alarm among both barristers and solicitors. This report advocated extending the authority and jurisdiction of the county courts, and thus localizing legal business. Mr. Justice Blackburn, dissenting from the report of the commission, said: "I attach much importance to the keeping up the great Central bar of England. The only real practical check on the judges is the habitual respect which they all pay to what is called the opinion of the profession, and the same powerful body forms, as I think, a real and principal check on the abuse of patronage by the government." —*Albany Law Journal.*

CURIOSITIES OF THE LAW REPORTERS.

Every man who has had occasion to consult the reporters or even the statutes, must have been occasionally amused by some quaintness or oddity of expression. Mr. Heard has made a collection of these curiosities, and has certainly disentombed a number of good things worth looking through. He leads off by Mr. Macqueen's observation on the *Barton's Hill Coal Company* v. *Reid and M'Guire*. "Reid and M'Guire were both victims to the same accident, which, though melancholy, has settled the law;"—doubtless a great satisfaction to the public, if not to Reid and M'Guire. Lord Abinger had a clear way of putting a point. When a question was raised by Government, with respect to the right of persons to take water from Portsmouth Harbour, Lord Abinger said: "An old woman must not take a bucket of water from that harbour, lest a seventy-four should not float." This is well matched by "March on Slander," in 1648, where it is said, with reference to the encouragement of actions of slander, "Though the tongues of men be set on fire, I know no reason wherefore the law should be used as bellows to blow the coals." Indeed the book abounds with neat epigrammatic utterances. The statute 1 Edw. II. enacts that a prisoner who breaks prison is guilty of felony; but if the prison be on fire, this is not so, "for he is not to be hanged because he would not stay to be burnt." The judgment in a very recent leading case, in the Court of Exchequer Chamber, concludes thus tersely: "In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason." In the course of the argument in *Lincoln* v. *Wright*, Lord Langdale observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something."

Vesey, junior, the reporter—of whom Lord Campbell says, "I knew him well; when near eighty he was still called Vesey, junior"—represents Lord Erskine as having decided an important point in medical astronomy, giving as marginal note, "In cases of lunacy, the notion that the moon has an influence is erroneous." We wish that we could get a few more authoritative and binding decisions of a similar character. For instance, what is the influence of the moon on the weather? Would the Court pronounce that too erroneous?

It may be a consolation to the Bar to know that many years ago the Court of Common Pleas refused to hear an affidavit read, because the barrister therein named had not the addition "esquire" to his name.

It is recorded of the saints of the Republic, that in reciting the Lord's Prayer they would never say, "Thy Kingdom come," but always "Thy Commonwealth come." From a similar spirit probably, though with better sense, the Court of King's Bench was styled during the time of "Style's and Aleyn's Reports," the Upper or Public Bench.

Blackstone is not commonly caught tripping. But he is here: "The royal fish are whales and sturgeons, which, when either cast ashore or caught near the coast, belong to the crown." Blackstone notices a curious distinction made by the old legal authorities, which is that the whale is to be divided between the King and Queen, the King taking the head and the Queen the tail, the reason assigned being that the Queen might have the whalebone for her wardrobe, although in fact the whalebone is found in the head and not in the tail. But then he has the support of Lord Chief Justice Abbott, who, in summing up a case, said, in *Montison* v. *Jefferies*, "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."

We suggest the following from "The two Supream laws of the Realm," found in "The practice unfolded" of Chancery, 1672, to the publishers of the next edition of "Bleak House:" "The princes of this land have appointed two supreme seats of Government within this Land: the one of Justice, wherein nothing but the strict letter of the Law is observed; and the other of Mercy, which in the rigour of the Law is tempered with the sweetness of Equity, the which is nothing but Mercy qualifying the rigour of Justice." From the same work comes this

also: "A vexatious plaintiff, *in forma pauperis*, and not able to pay costs upon the dismission, hath been ordered by the Lord Egerton to be whipped, upon the equity of the statute 23 Hen. VIII. c. 15, and not to be admitted *in forma pauperis*."

Certain rules of evidence, which are now considered fundamental, were repeatedly violated, if not altogether unknown in the seventeenth century. In the trial of Mr. Hawkins, a clergyman, for stealing money and a ring from Henry Larimore, in September, 1668, Lord Hale admitted evidence to show he had once stolen a pair of boots from a man called Chilton, and that, more than a year before, he had picked the pocket of one Noble. In summing up, Lord Hale said, after referring to the cases of Chilton and Noble, "This, if true, would render the prisoner now at the bar obnoxious to any jury."

We do not remember to have met with the following before. The jurymen in Penn and Mead's case were fined (Bushell, of course, among them), and the court threatened to slit their noses. The commonest way of punishing a jury—the recognized way—when they could not come to a unanimous verdict, was to put them in a cart and shoot them into the nearest ditch. In Noy a precedent is cited in these words:—"The jurors acquitted a prisoner contrary to their evidence, and for that they were fined and imprisoned, and bound for the good behaviour of the prisoner during his life."

The propcsition for conducting all law proceedings in English was most strenuously opposed. The reporters who delighted in the Norman French were particularly obstreperous. "I have made these reports speak English," says Style, in his preface (A.D. 1658), "not that I believe they will be thereby more generally useful, for I have been always, and yet am, of opinion, that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments, as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their own mother tongue." And Bulstrode, in the preface to the second part of his Report, says, "that he had many years since perfected the work in French, in which language he had desired it might have seen thee light, being most proper for it, and most convenient for the professors of the law."

In the Statutes at large some funny things may be found. There is one which is not to be brought to book, and must be given as a tradition of the time when George III. was King. Its tenor is that a Bill which proposed, as a punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty, and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an Act, the punishment was changed to whipping and imprisonment, the destination being unaltered.

In "Hortensius," p. 259, note, a most amusing instance of identification of counsel with client is related. It occurred in the case of a counsel for a female prisoner who was convicted on a capital charge, and on her being asked why sentence of death should not be passed upon her, he rose and said, "If you please, my Lord, *we are with child*."

He was, however, wrong in point of law, pregnancy cannot be taken advantage of in arrest of judgment, but only in stay of execution.

Some of the most amusing curiosities are those which consist of high flown language. That of some of our judges has been wonderfully luxuriant at times. But we are beaten altogether by the American Bench and Bar. Here is a glorious extract from a passage addressed in solemn argument to the Supreme Court of the United States:—"Fraud vitiates every thing into which it enters; it is like the deadly and noxious simoon of arid and desert climes; it prostrates all before its contaminating touch, and leaves death only and destruction in its train. No act, however solemn; no agreement, however sacred, can resist its all-destroying power."

The following, however, is yet finer; it occurs in a recent case in Pennsylvania. Mr. Justice Lewis thus discourses of a condition in a will in restraint of marriage:

"The principle of reproduction stands

next in importance to its elder born correlative self-preservation, and is equally a fundamental law of existence; it is the blessing which tempered with mercy the justice of expulsion from Paradise; it was impressed upon the human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures; not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep; from the subtlety of the serpent to the innocence of the dove, from the celastic embrace of the mountain Kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance, and decorate the forests and the fields with their hues, are but curtains to the nuptial bed. The principles of morality, the policy of the nation, the doctrines of the common law, the law of nature and the law of God, unite in condemning as void the condition attempted to be imposed upon his widow."—*Law Magazine.*

PROOF OF TELEGRAPHIC MESSAGES.

An English lawyer has pointed out, in a letter to the *Times*, the difficulty of proving contracts within the Statute of Frauds, where the party sought to be bound has sent his message by telegraph. He states that at the end of six months the originals of telegraphic despatches are destroyed, in accordance with the routine of the department; and that, unless the dispute between sender and receiver has ripened within that time, the plaintiff is pretty sure not to have secured the original memorandum signed by the defendant or his agent, before its destruction at the Post Office. Now, Mr. Lascelles proposes that after the expiration of some such fixed term as the Post Office may deem necessary for the purposes of comparison, &c., the originals shall be forwarded to the persons to whom they are addressed, upon the request of such persons, provided such request be made within a fixed period—say of six months. This seems a valuable suggestion, but we are rather inclined to think that the original of every telegraphic despatch ought to be forwarded to the party addressed at the earliest date consistent with the arrangements of the Post Office. Of course this plan would entail some additional cost on the Post Office; but the senders should be compelled to fold the messages, and deliver them in open addressed envelopes to the operator. This scheme would be productive of good in three ways. First, an error in the telegraphic message would be corrected by the despatch itself, and in many cases the mischief likely to arise from the error might be averted. Second the receiver of the message and original despatch would always be able to adduce proof to satisfy the Statute of Frauds, assuming the memorandum itself to be sufficient. Third, a more effective stop would be put on false, suppositious, and libellous messages; because the party addressed would at once be put in possession of the manuscript of the actual sender. At the present price of inland messages, we should think that the department ought not to begrudge the public every reasonable help in the transactions of business, even at the risk of some additional expenses in the employment of folders and the extra bulk of the mails.—*Irish Law Times.*

TRUTH IN THE WITNESS BOX.

Not a fortnight ago Mr. Justice Grove in trying a horse cause, found the evidence very contradictory, and thereupon took occasion to observe that "it was lamentable to see that in this country, which used to be a truth-loving country and which formerly prided itself on possessing the virtue of veracity, perjury was scarcely looked upon as a crime." Horse warranty causes, running down cases by land, and collision cases at sea, have always been remarkable for the conflict of evidence adduced on either side; and, at least as to these, there is no reason whatever for supposing that witnesses in this country have ever been remarkable for veracity. But putting aside causes of this class, which, from circumstances well known to practitioners, are to be considered as a distinct class, we do not for a moment admit the fairness of the criticism passed by the learned judge on English witnesses. His Lordship displayed in his invective a misconception

of the course of legal history, and of the rules which govern this department of human morality. We should be astonished in no small degree if any judge, lawyer, or historian could point out to us the precise period of our early Nisi Prius history, at which witnesses were distinguished for love of the truth, and juries were not driven to decide between contradictory masses of evidence. But without being even so exacting as this, we may safely push his Lordship home on one point. Until a comparatively recent date the evidence of parties to the cause was altogether excluded; and common observation would invite the conclusion that the testimony of indifferent persons was less likely to be false than that of persons strongly tempted to change, modify, or at least colour their knowledge of the facts at issue. When the Legislature of this country determined to throw down the barriers which kept out a cloud of witnesses in every cause, it did so with full appreciation of the peril necessarily arising from the temper, the bias, the irresistible zeal, of all partisans. Bentham never ignored the possibility of deception arising from all these causes. He only argued that truth was the grand object to be attained, and that the shortest and safest way to it was to listen to all those who knew the facts. The certainty of a measure of falsehood was accepted for the chance of securing a larger measure of justice in the long run. And who is there that is prepared to say that Bentham and the Legislature which followed his teaching was wrong, and that we ought to walk back upon the footsteps of our progress, because we have discovered that men who are interested in a cause are less worthy of confidence than those who are absolutely impartial?—*The Law Journal.*

Her Majesty's gracious speech at the opening of parliament has rarely promised such changes in the law proper as are foreshadowed in the speech from the throne delivered yesterday by the Lord Chancellor. Foremost among intended measures is a Bill for the formation of a Supreme Court of Judicature, including provisions for the trial of appeals. Next comes a Bill to facilitate the transfer of land, and besides these two great measures, specially mentioned, there is in the speech a general promise of "various other Bills for the improvement of the law." Among these unnamed Bills, it would not be presumptuous to place the Code of Evidence to be introduced by the Attorney-General. On the border land between the law proper and the general law of the land stands an intended Bill to amend the general acts regulating railways and canals. The principal Bills for social improvement mentioned in the Speech are Bills to amend the system of local taxation, and the education Act, 1870. No Bill of a purely political character finds its place in the programme, unless the question of University education in Ireland is to be regarded as such. Experience teaches us that in matters of law reform "the expected" does not always or even generally happen, and the retrospect to be made by us in August next will, we may be sure, differ very considerably from the prospect now offered by the Royal Speech.—*The Law Journal.*

Mr. Edwin James has addressed a petition to the Lord Chief Justice of the Queen's Bench, to the Lord Chief Justice of the Common Pleas, to the Lord Chief Baron of the Court of Exchequer, and to the rest of the judges of those courts, asking them to appoint a day for hearing an appeal against the order vacating his call to the Bar; Mr. James asks that that order may be reversed, and his name restored to the books of the Society of the Inner Temple. Mr. James recites in his petition the whole story of his embarrassments, his flight from England, and his expulsion from the Bar after twenty-five years of practice as an advocate, and part of the time as a Queen's Counsel. The petition concludes by giving nine reasons why the order of the Benchers was not just, and ought to be revised. They are briefly that there was no specific charge preferred against him, no evidence of any misconduct, professional or otherwise, adduced, and that the Benchers constituted themselves accusers and judges, and refused his counsel reasonable time to address them. The order he maintains is invalid, since it does not inform him upon what charges of misconduct he has been disbarred; the decision was hasty; no chance was given him of explaining or rebutting testimony, and hearsay evidence

was taken. Finally, Mr. James urges that the Benchers conducted the inquiry unjustly and inquisitorially, inquiring into private matters not under their cognizance, and that charges and insinuations were made by Benchers, who afterwards acted as judges, and unfairly influenced the majority of the Benchers against him.—*The Law Times.**

The *Pall Mall Gazette* has told a good story concerning a dinner at the White Hart, in Windsor, at which the Mayor and Corporation of the royal borough amazingly enjoyed themselves. Not wishing to put an end to their festivities at 11 P. M., the guests induced some three of the justices there present to hold a petty sessions, and grant the landlord special leave to keep open house till midnight. The anecdote is a good one, and suggests a variety of important considerations; among others, the probability that what was done, or alleged to have been done, at Windsor will be elsewhere, giving only sufficient social influence to the revellers. At the close of this month, the Home Circuit will give a dinner to the two new judges at a public tavern, and it is just possible that some of the juniors will seek to prolong the merry time beyond the closing hour. Every year the Attorney-General gives a dinner to the bar on Her Majesty's birthday, and hitherto the hour fixed for dinner has been so late as to render the termination of the feast by 11 P.M. impossible. We shall anticipate a dispensation for that occasion with much interest, being among those who are unable to see why the banquets of great people are 'quite a different thing' from the 'free and easies' of little people.—*Law Journal.*

The following clever lines are going the rounds of the legal press and are worth preserving. The man who makes his own will is of course a well known toast at Bar dinners. The following is an amplification of the sentiment :—

The Jolly Testator who Makes his Own Will.

Air :—*Argyll is my name.*

Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease ;
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me.
When a festive occasion your spirit unbends,
You should never forget the Profession's best friends,
So we'll send round the wine, and a light bumper fill
To the jolly testator who makes his own will.

He premises his wish and his purpose to save
All disputes among friends when he's laid in his grave ;
Then he straightway proceeds more disputes to create
Than a long summer's day would give time to relate.
He writes and erases, he blunders and blots,
He produces such puzzles and Gordian knots,
That a lawyer intending to frame the deed *ill*,
Couldn't match the testator who makes his own will.

Testators are good, but a feeling more tender
Springs up when I think of the feminine gender :
The testatrix for me, who like Telemaque's mother,
Unweaves at one time what she wove at another.
She bequeaths, she repeats, she recalls a donation,
And she ends by revoking her own revocation ;
Still scribbling or scratching some new codicil ;
Oh ! success to the woman who makes her own will.

'Tisn't easy to say, 'mid her varying vapors,
What scraps should be deemed "Testamentary Papers ;"
'Tisn't easy from these her intention to find,
When, perhaps, she herself never knew her own mind.
Every step that we take there arises fresh trouble :
Is the legacy lapsed ? is it single, or double ?
No customer brings so much grist to the mill
As the wealthy old woman who makes her own will.

The law decides questions of *meum* and *tuum*
By kindly consenting to make the thing *suum* :
The Æsopian fable instructively tells
What becomes of the oysters and who gets the shells.
The Legatees starve, but the Lawyers are fed ;
The Seniors have riches, the Juniors have bread ;
The available surplus, of course, will be *nil*
From the worthy testators who make their own will.

You had better pay toll when you take to the road,
Than attempt by a by-way to reach your abode ;
You had better employ a Conveyancer's hand,
Than encounter the risk that your will shouldn't stand.
From the broad, beaten track when the traveller strays,
He may land in a bog or be lost in a maze ;
And the law, when defied, will avenge itself still
On the man and the woman who make their own will.

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* The petition of Mr. James has been refused.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

NOTES OF RECENT DECISIONS.

GROVES v. McARDLE.

Insolvent Act of 1869—"Trader"—Pleading several matters—Estoppel.

Action by official assignee to recover a debt due to an insolvent. Plea that insolvent had not been a trader within the insolvent act of 1869. Leave to take issue on this plea, to reply specially that defendant was estopped from this defence, and to demur was refused.

PLIMSOLL v. BLACK.

Pleading several matters.

A plea of payment, and a plea of payment into Court cannot be pleaded together to the same cause of action.

McDONALD v. McEWAN.

Pleading—Further time to plead.

When further time to plead is allowed by order, the extra time is to be computed from the date of the order, and not from the expiration of the original time allowed by law.

ABELL v. GLEN.

Covenant—Never indebted—Nullity or irregularity.

To an action in covenant the defendant pleaded never indebted.

Held, not a nullity, but merely an irregularity. Treating a pleading as a nullity does not prevent its afterwards being attacked as an irregularity.

ENGLISH REPORTS.

COURT OF COMMON PLEAS.

BEST AND ANOTHER. v HILL.

Equitable plea—Set-off of unliquidated damages—General issue.

Declaration for money lent, money paid, and commission for the plaintiffs having for and at the request of the defendant, provided the money for paying, and paid divers bills of exchange.

Plea on equitable grounds that defendant assigned to plaintiffs for sale, and as security for the payment of the said moneys, and of certain accommodation acceptances of the plaintiffs' goods described in certain bills of lading which defendant also assigned to plaintiffs as security as aforesaid, and in order that plaintiffs might, out of the proceeds of the said goods and by proper sales thereof, pay and satisfy the said moneys and acceptances. Allegation that the plaintiffs took possession of the goods and bills of lading, and took such bad care of part of the said goods that the same were deteriorated in value, and were sold by plaintiffs at lower prices than they might have been, and plaintiffs also negligently sold the same goods below the market price, and received the proceeds thereof. Further allegation that the said goods might, and ought to have realised by the sales thereof more than sufficient to have paid and satisfied the said moneys and acceptances, and that through the mere negligence, &c., of plaintiffs, the security of the said goods became lost to the defendant, and the said goods and the proceeds thereof became and were insufficient to discharge the said acceptances and moneys.

Demurrer:

Held, first, that the plea was bad as amounting to a set-off of unliquidated damages; and secondly, that it could not be supported as a plea of the general issue.

[27 L. T. N. S. 490—Nov. 14, 1872.]

The declaration stated that the plaintiffs sued the defendant for money lent by the plaintiffs to the defendant, and for money paid by the plaintiffs for the defendant at his request, and for commission for and in respect of the plaintiffs having for the defendant at his request by their bankers, being their agents for that purpose, provided the money for paying, and paid divers bills of exchange, and for interest upon money due from the defendant to the plaintiffs, and by the plaintiffs forborne at interest to the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

The fourth plea (as amended) was as follows: And for a fourth plea, and as a defence on equitable grounds, the defendant says that he assigned and transferred to the plaintiffs for sale, and as a security and means for the payment of the said moneys in the declaration mentioned, and certain accommodation acceptances of the plaintiffs certain goods mentioned and described in certain bills of lading, which the defendant then also assigned and transferred to the plaintiffs as a security for the payment of the said moneys and acceptances, and in order that the plaintiffs might by and out of the said goods, and by the due and proper sales of the said goods, pay and satisfy the said moneys and acceptances. And the defendant further says that the plaintiffs took possession of the said goods under and by virtue of such bills of lading, and took such bad and improper care of a part of the said goods whilst the same were in their possession as aforesaid, that the same when sold by the plaintiffs as hereinafter mentioned became and were in bad condition, much deteriorated in value, and the same by reason thereof, were sold by the plaintiffs at much lower and

inferior prices than they might and would have been; and the plaintiffs also negligently and improperly sold the several goods at prices much below the market prices, of such several goods when sold, and before this suit received the proceeds thereof; and the defendant further says that the said goods before this suit could and might and ought to have been sold and realised the sales thereof, and but for such bad and improper care, and negligent and improper sales, would have realized sufficient, and much more than sufficient, to have fully paid and satisfied the whole of the moneys in the declaration mentioned, and the said acceptances and claims of the plaintiffs in respect thereof, and now sued for, if the same had been taken due and proper care of by the plaintiffs as aforesaid, and sold with due and proper care; and that by and through the mere negligence, wilful default, and improper conduct of the plaintiffs as aforesaid, and in effecting such sales, the security of the said goods became and was wholly lost to the defendant, and the said goods and the proceeds thereof became and were before this suit and are insufficient to discharge the said acceptances and moneys now sued for.

Demurrer to fourth plea and joinder.

Cohen in support of the demurrer.—(1.) This is simply an attempt to set-off a claim for unliquidated damages against a debt. The doctrine of equitable set-off is explained in *Rawson* v. *Samuel* 1 Craig & Ph. 178, where Lord Cottenham says: "We speak familiarly of equitable set-off as distinguished from the set-off at law, but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient: *Whyte* v. *O'Brien*, 1 S. & S. 551; although it is difficult to find any other ground for the order in *Williams* v. *Davis*, 2 Sim. 461 as reported. In the present case there are not even cross demands, as it cannot be assumed that the balance of the account will be found to be in favour of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assesses their damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion." And in Story's Equity Jurisprudence, ss. 1436, 1443, where the doctrine of the civil law is also treated. This is not a case in which a court of equity would grant an immediate, unconditional, and permanent injunction to restrain the plaintiffs. There is no general equity to restrain a person from suing because the opposite party has a claim which he may bring forward at some future time. If the plea means that the cause of action arose from the neglect of the plaintiffs, and not otherwise, such plea is unknown in actions of debt. (2) My learned friend cannot maintain that the plea amounts simply to the general issue. The court cannot put this interpretation upon it, unless that be clearly its meaning. The agreement between the parties did not stipulate that if any deficiency was occasioned by the plaintiffs' negligence, the defendant should not be liable for the balance. There was a debt which has not been swept away by anything.

Butt, Q.C. *Baylis*, and *F. P. Tomlinson* for the defendants.—This plea is good, for the court can do entire justice between the parties: Bullen and Leake's Prec. Plead., p. 556, note; *Mutual Loan Fund Association* v. *Sudlow* 28 L. J. 108, C. P. The plaintiffs having agreed to take their money out of the proceeds of the goods, have prevented themselves from doing so by their own transaction. As to there being no equity see *Stimson* v. *Hall*, 1 H. & N. 831; *Beasley* v. *D'Arcy*, Scholes & Lef. 403, note.

Bovill, C. J.—The claim which the defendant endeavours to set-off by his equitable plea is a claim for unliquidated damages. That claim therefore would not be available as a defence at law. Neither could the Court of Chancery deal with the matter. If the defendant had asked for an injunction the Court of Chancery would certainly not have granted it immediately and unconditionally, but would have imposed terms. The terms would probably have been that the parties should proceed to try the question at law and ascertain the amount of damages. Considerable delay might thus be caused, and there would have to be a further provision for compensation for that delay, and terms imposed as to bringing money into court. In *Rawson* v. *Samuel* it must be taken that for purposes of the decision the damages to be set-off were liquidated, because they were to be ascertained by taking an account. From one point of view they were unliquidated, because there was a long account, and the balance had to be ascertained. Lord Cottenham, at p. 177, says: "Whatever weight may be attached to this statement of belief as to the probable balance of a long and complicated account, the case is

certainly not one in which the plaintiffs in equity can ask the court to assume that the balance will be in their favour." And again, "It was said that the subjects of the suit in this court and of the action at law arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matter are therefore totally distinct; and the fact that the agreement was the origin of both, does not form any bond of union for the purpose of supporting an injunction." It seems impossible to distinguish that case from the present, and I am of opinion that this plea of an equitable set-off cannot be supported. It was then contended that it might be supported as a plea of "never indebted." It amounts to this, however, only if it appears that no debt arose, but the declaration and plea show that a debt did arise. How was it to be satisfied? It cannot be said that it carried its own payment out of the dangers arising from the breach. The claim for breach of the agreement is a cross claim. There was no agreement that the debt which is admitted by the plea and declaration was to be paid out of the damages, or that the deficiency was to be made good out of the damages.

Keating, J.—I am entirely of the same opinion. It is conceded that a claim for unliquidated damages cannot be set off at law, and no authority has been cited to show that the Court of Chancery would deal with such a claim until the amount had been ascertained. In *Rawson* v. *Samuel* it was so. In the Irish case cited, the unliquidated demand was first liquidated before it was dealt with. For the reasons stated by my Lord I agree that the plea cannot be supported as amounting to the general issue.

Brett, J.—I am of the same opinion. The plea is bad at law because the damages are unliquidated. It is also bad in equity, first, because the claims are unconnected; and secondly, because the damages being unliquidated, the Court of Chancery would not grant an immediate and unconditional injunction. Also, it does not amount to a plea of the general issue. The agreement, taken most favourably for the defendant, is that if there is a deficiency on the sales, the defendant will pay it, *i.e.*, become indebted to the plaintiffs for money advanced. On that the debt arose. There the defence is that the deficiency was caused by the plaintiffs' own fault. That is, if true, a matter for a cross action.

Denman, J.—I am of the same opinion.

Judgment for plaintiffs.

COURT OF APPEAL IN CHANCERY.

Gaunt v. Fynney.

Nuisance—Noise—Vibration—Light—Delay—Damages.

The defendant in Jan., 1865, erected a steam-engine in a shed adjoining the stable belonging to the plaintiffs, by which the stable was rendered unfit for horses, and some inconvenience occasioned in the plaintiffs' dwelling-house. No complaint was made by the plaintiffs until June, 1870.

Held (affirming the decision of the Master of the Rolls), that an injunction could not be granted under the circumstances to restrain the defendant from working the engine.

A nuisance by noise, supposing malice to be out of the question, is a question of degree. It is not every occasional and accidental noise more loud or harsh than usual, that will entitle a plaintiff to an injunction where the general case of "habitual nuisance" is not satisfactorily proved.

Bill dismissed.

[27 L. T. N. S. 569—Nov. 4th, 1872.]

This was an appeal from a decree of the Master of the Rolls (reported 26 L. T. Rep. N. S. 208). A full statement of the facts and arguments will be found in the judgment of the Lord Chancellor.

Sir *R. Baggallay*, Q.C. *Anderson*, Q.C. and *Rowcliffe*, for the plaintiffs, relied upon: *Hindley* v. *Emery*, 13 L.T. Rep. N.S. 272; Rep. 1 Eq. 52; *Durell* v. *Pritchard*, L. Rep. 1 Ch. App. 244; *Cooke* v. *Forbes*, 17 L. T. Rep. N. S. 371; L. Rep. 5 Eq. 166; *Goldsmith* v. *Tunbridge Wells Commissioners*, 14 L. T. Rep. N. S. 154; L. Rep. 1 Ch. App. 349; *Yates* v. *Jack*, 14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. App. 295; *Dent* v. *Auction Mart Company*, L. Rep. 2 Eq. 238; 14 L. T. Rep. N. S. 827; *Saville* v. *Kilner*, 26 L. T. Rep. N. S. 277; Joyce on injunctions, p. 201. The *Solicitor-General* and *Fry*, Q. C. for thedefendant, referred to *Curriers' Company* v. *Corbett*, 12 L. T. Rep. N. S. 169; on app. 13 L. T. Rep, N. S. 154; *Robson* v. *Whittingham* L. Rep. 1 Ch. App. 442; 13 L. T. Rep. N. S. 730: *Clarke* v. *Clark*, L. Rep. 1 Ch. App. 16; 13 L. T. Rep. N. S. 432; *St. Helen's Smelting Company* v. *Tipping*, 12 L. T. Rep. N. S. 766; 11 H. L. Cas. 642, 650; *Crump* v. *Lambert*, L. Rep. 3 Eq. 409; 17 L.T. Rep. N. S. 133; *Soltau* v. *De Held*, 2 Sim. N. S. 133.

The Lord Chancellor (Selborne).—The plaintiffs, who are unmarried ladies living at Leek, in Staffordshire, ask for an injunction (with damages) to restrain an alleged nuisance by noise and vibration, and to restrain alleged trespasses by encroachment on land and obstruction of light. The Master of the Rolls has made a decree refusing an injunction, but grant-

ing an inquiry as to damages, from which decree both parties appeal. Leek is a town in which the silk manufacture is carried on. The plaintiffs' house faces a street, called Derby Street, to the south, and has a garden of some size to the north; with two stables to the east, separate from the house and from each other. Eastward and southward of the nearer of these stables (called the old stable) which is about nineteen yards from the house and garden, is a silk mill belonging to, and worked by, the defendant. The plaintiffs state that the defendant was formerly in the employment of the plaintiffs' father, who was a mill-owner carrying on the silk manufacture in part of the buildings now occupied by the defendant. The defendant states that the plaintiffs' father (from whom they derive their title) deliberately placed his house (the same house in which the plaintiffs now live) close to the mill. The mill has, however, been much enlarged, by the addition of new buildings, since that time. Down to the winter of 1864-5, it was worked by hand-power; and a narrow strip of land between the northern part of it and the eastern wall of the plaintiff's old stable remained unbuilt upon. In that winter the defendant caused this intervening space to be covered over, and erected a small steam-engine of about 4-horse power in the chamber so formed, connecting this engine by proper gearing with the machinery in the mill, which from that time forward was worked by steam. The plaintiffs made no complaint of any annoyance till the summer of 1870; and they were in the habit of keeping three or more horses or ponies in the old stable, till the end of Oct. in that year. I consider it to be admitted upon the plaintiffs' pleadings, and established by their evidence, that there was no nuisance from noise or vibration, either to the house, or to the garden, or to the stables, prior to the end of May, or the beginning of June, 1870. But the plaintiffs allege that the defendant's mill then began to be worked with such a degree of noise as to become after that time a serious nuisance; that they remonstrated, and received promises of redress; but that nothing was effectually done to remedy the evil; and that in and after Oct., 1870 the noise and vibration increased daily, destroying, or materially diminishing, the comfort, salubrity, and value of their house and garden, and rendering the old stable unsafe and unfit for horses; in consequence of which their horses were removed from it at the end of Oct., or the beginning of Nov., 1870. The bill was filed on the 28th Nov., 1870. The question of trespass has emerged during the progress of the controversy, but this rests on distinct grounds, and must be separately considered. The case, thus made, is met by the defendant with a general denial of the material facts alleged. He says that no changes have been made in his engine or machinery since Jan., 1865, except some which were made in 1870 to meet (as far as possible) the plaintiffs' objections; that the manner of working them has been throughout, both in kind and in degree, the same; that there has been no increase, either of noise or vibration; that the state of things of which the plaintiffs now complain is a mere continuation of that which existed without complaint during the five preceding years, and which is admitted not to have then constituted a nuisance. In these statements he is supported by the evidence of every witness in the cause who has any knowledge of the interior working of the mill. [His Lordship then referred to the evidence.] If the defendant's evidence is believed, the plaintiffs' case fails. The burden of proof as to this part of the case rests wholly on the plaintiffs. The Scotch law has a phrase which in cases of this nature may well admit of a negative, as well as of a positive, application. It forbids a man to use his own rights "*in emulationem vicini*." Neighbours everywhere (and certainly in a manufacturing town) ought not to be extreme or unreasonable, either in the exercise of their own rights or in the restriction of the rights of each other. The ruling approved by the House of Lords in the *St. Helen's Smelting Company's* case that "the law does not regard trifling inconveniences," and that "everything is to be looked at from a reasonable point of view," and the observations of Lord Cranworth seem to be particularly applicable to such a case as the present. [His Lordship then read passages from the report, 11 H. L. Cas. 650.] There may, of course, be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau* v. *De Held* (2 Sim. N. S. 133) is an example. But a nuisance of this kind is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible or tangible cause; as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works over land or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party wall next to my own, and

I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things to offend against the law must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable. I am far from saying that there may not be cases in which the owner of a house very near a mill in a manufacturing town may be entitled to protection against noises resulting from the introduction into the mill of new machinery, or of new modes and processes of working. But in every case of this kind it ought to be clearly made out that the mill-owner has exceeded his rights. When there has been no introduction of new machinery, and nothing new in the manner of working—when everything within the mill has gone on without change in the usual and accustomed course of the manufacturer's business—a plaintiff undertaking to prove that at and after a definitive time the noise from the mill admitted to have been previously lawful and harmless, became excessive and noxious, imposes upon himself (to say the least) an arduous task. And how have the plaintiffs acquitted themselves of this burden? I see no reason to doubt that they, and their servants and friends who were witnesses in this case (several of whom have not been cross-examined), do themselves believe that the considerable increase of noise of which they speak has really taken place, and are persuaded that this noise is a serious nuisance. But it is not impossible that this should be the case, and yet that the witnesses for the defendants (none of whom have been cross-examined) should be believed. Those who compare the noise which they hear to-day with the noise which they heard months or years ago, are witnesses (within certain limits) to impressions upon the mind, rather than to facts. Those who speak of the manner in which the engine and machinery have been worked, and the business of the mill carried on, speak of facts, and not of impressions on the mind. Mr. Fry made a happy use in part of his argument of a passage in a recent work upon mental science (*a*) which (treating of the influence of the mind upon the sense of hearing) says "that the thought uppermost in the mind, the predominant idea or expectation, makes a real sensation from without assume a different character." Every one must have had some experience of the truth of this statement; a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance originating within himself sounds which at other times would have been passively heard, and not regarded. In the present case, I have no doubt that a real "whirring sound," such as the plaintiffs' witnesses describe, did proceed from the machinery in the mill when at work, at all times before as well as after the erection of the steam-engine in 1864–5. I have no doubt that this sound (and also the sound of the steam-engine after its erection) was often, if not always, perceptible in the plaintiffs' garden, and in some of the rooms of their house, especially when the windows were open; I have no doubt that it was louder and more audible at some times, and when the wind was in particular quarters, than at other times, and other states of the wind. I have no doubt that it must always have been more or less heard in the old stable, where the heads of the horses, as they stood in their stalls, were turned towards the wall (described as a thin wall), on the other side of which the engine was fixed; and where there was a small window, which but for its being closed by certain boards would have opened directly into the engine room itself. But all this is admitted to have gone on from January, 1865, to June, 1870, without amounting to a nuisance. In June, 1870, a sudden noise had alarmed the servants of the plaintiffs, and since that time the plaintiffs had entertained the idea of some danger from the boiler used by the defendant. From this time forth the engine and its noises were to the plaintiffs a permanent source of irritation and uneasiness. [His Lordship then examined the evidence on both sides as to the house, and as to the effect of the noise and vibration on the horses in the stable.] Witnesses for the plaintiffs have stated that on one occasion the horse of a visitor when put in the stable was so terrified that he had to be removed; but this evidence does not make a powerful impression on my mind. The case of *Cooke* v. *Forbes*, L. Rep. 5 Eq. 166, shows that it is not every occasional and accidental noise which might frighten a horse in a stable on a particular day that will entitle a plaintiff to an injunction, if the general case habitual nuisance alleged in the bill is not satisfactorily proved. His Lordship came to the conclusion that no sufficient case was made out, and that the bill, so far as it sought relief on the ground of nuisance, must be dismissed. As to the trespass, it appeared that part of the defendant's engine-house overhung the plinth of one of the plaintiffs' walls. The defendant, however, disputed the right of the plaintiffs to the plinth, a question which he could not then determine. It was enough to

dispose of that, that the defendant had been in possession for more than five years without remonstrance on the plaintiffs' part. A bill for an ejectment by way of mandatory injunction could not be supported under these circumstances, and that part of the bill must also be dismissed. His Lordship continued: There is left only one more question; that of the obstruction of the window in the plaintiffs' old stable by the board, placed against it, and also by the roof of the defendant's engine-room. As to this, I have felt some embarrassment. On the other hand, it seems to me that an unlawful obstruction by the defendant of an ancient, though not very valuable, light of the plaintiffs had been established. On the other hand, this obstruction took place nearly six years before the bill was filed, under the very eyes of the plaintiffs or their servants, who can never have gone into the stable without perceiving it; and the light does not appear to have been for any practical purpose missed or wanted since its obstruction. A bill for an injunction in such a case would (I think) before the passing of Lord Cairns' Act, have been dismissed, and the plaintiffs would have been left to their remedy at law. Since this Act, if the bill were not dismissed, I should certainly agree with the Master of the Rolls in thinking the case one for an inquiry as to damages, and not for an injunction. But, finding myself obliged to leave the plaintiffs to their legal remedy (if any) as to the other matters complained of, and being of opinion that the obstruction of light is so connected with the other alleged trespass as to make it possible that some injustice might be done if damages as to the light were given here, and the plaintiffs at the same time left in possession of all their legal remedies as to the plinth of their wall and the disputed slip of land, I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any action which the plaintiffs may be advised to bring. The costs of the suit will follow the event; the plaintiffs' appeal petition will be dismissed with costs. There will be no costs of the defendant's appeal; but the deposit will be returned.

COURT OF PROBATE.

Morrit v. Douglas.

Testamentary Suit—Execution — Acknowledgment — Know and approve of the contents.

The two attesting witnesses were called in to witness the testator's will, which had been written by another person. The testator's mark was on the will when they were asked to sign, but they did not see him make it. The testator said nothing about the will to them, and the will was not read over to him.

Held, not to be duly executed, and that the testator did not know and approve the contents.

[27 L. T. N. S. 591—Dec. 10, 1873.]

George Morrit, farmer, late of Barley, in the county of York, died 18th Jan. 1863, leaving a will bearing date 9th May, 1862, which after disposing of all his property was executed in the following form:

In witness whereof I have subscribed my name, this ninth day of May in the year of our Lord one thousand eight hundred and sixty-two.

Thomas Morrit + my mark

In witness of the testator's signature we have subscribed our names in the presence of the testator, and in the presence of each other.

Thomas Morrit + my mark.

George Robinson } Witnesses.
Henry Parkinson }

The will appointed no executors, and was propounded by the defendant, Mary Anne Douglas, the testator's daughter, and one of the residuary legatees. The plaintiff, the testator's son, pleaded in opposition undue execution, and that the testator did not know and approve of the contents, inasmuch as the will was not read over to him at the time of the execution, and that he was not aware of the contents. The plaintiff also gave notice that he insisted on proof in solemn form, and to cross-examine the witnesses. The case was tried before the court without a jury. George Robinson, one of the attesting witnesses, was dead, and Henry Parkinson, the other attesting witness, gave the following account of the transaction:

I recollect being called in to the house of Richard Douglas, who then resided at Barley. When I got into the house I saw Thomas Morrit, the testator, sitting in an arm-chair. Mary Ann Douglas, the defendant, and one Thomas Davis, were in the room. She and her husband got up and went out of the room. Thomas Davis said to me and Robinson, the other witness, "I want you to sign this will, it is of no use reading it over to you," and Robinson said, "No it does not matter to us." Thomas Davis then went out of the room. There was no other person in the room but Thomas Morrit, the testator, when Robinson and I signed our names. There was a mark on the will when we signed our names, but I cannot say who made it. The deceased never signed his name nor made any mark to any document in my presence. The will was not read over in my presence, nor did the testator speak of it or refer to it in any way whatever. The only conversation that took place in the room was, George Robinson asked the testator how he was, when he replied, "I am mending." The testator had broken his thigh a short time previously, and I don't think he was quite in his own mind.

Cross-examined:

The witness further said, Robinson and I went out when we had signed, I only noticed one mark on the will, it was the first.

G. H. Cooper submitted that the will was duly executed, and that the deceased knew and approved the contents. At this distance of time everything should be presumed in favor of the will. Parkinson saw the mark on the will before he signed, and what Davis said in the testator's presence amounts to an acknowledgment: *In the goods of Bosanquet*, 2 Robart. 577; *In the goods of Jones*, Deane & Swa. 3. As to knowing and approving the contents, Sir C. Cresswell held that there was no occasion for a man to know the contents of his will. He might delegate to another the task of making his will:

Middlehurst v. *Johnson* 30 L. J. 14; *Canliffe and Ormerod* v. *Cross*, 3 S. & T. 37; He also referred to—*Hastilow* v. *Stobie*, 35 L. J. 577, P. & M.; L. Rep. 1 P. & D. 64. *Cleare* v. *Cleare*, L. Rep. 1 P. & M. 655; 20 L. T. Rep. N. S. 457; *Allen* v. *Atkinson*, L. Rep. 1 P. & D, 655; 20 L. T. Rep. N.S. 404.

Searle for the plaintiff.—The defendant has not discharged the burden of proof on him to show that it is the testator's will. As to acknowledgment in the cases cited, the will was signed by the testator, here there is only a mark. The plaintiff is bound to show that the deceased knew and approved the contents of the will:

Cleare v. *Cleare* (*sup.*) *Grodatre* v. *Smith*, L. Rep. 1 P. & D. 359. *Cur. adv. vult.*

Sir James Hannen.—The issues in this case were—First, whether the alleged will of Thomas Morrit, dated the 9th May, 1862, was duly executed; and, secondly, whether the deceased at the time of the execution of the said alleged will knew and approved of the contents thereof. The alleged will purported to be executed by the deceased by mark. One attesting witness, Henry Parkinson, was called, who stated that upon going into the room where the deceased was, a person named Thomas Davis said to him and the other attesting witnesses that "he wished them to sign Thomas Morrit's will." The witness in answer to the question, "Did Thomas Morrit hear that?" said "Yes, he sat close by." It is clear that the witness merely drew the inference that the deceased heard from the fact that he was near. No other evidence was offered to connect the alleged will with the deceased. The mark which is alleged to be that of the deceased was already on the paper when the witnesses were called in. The will was not read to or by the deceased in their presence, nor was any allusion made to it by anyone beyond the words uttered by Davis, and the witness stated that he thought the deceased was not exactly in his right mind at the time. At the hearing several cases were cited, which I have examined, but I do not think it necessary to comment on them, as they have not assisted me to come to a conclusion on the simple facts of this case. It is sufficient to say that the evidence entirely fails to satisfy me that the deceased either acknowledged the mark to be his, or that he knew what the contents of the alleged will were.

UNITED STATES REPORTS.

DISTRICT COURT.

Passmore v. Western Union Telegraph Co.

1. A regulation that a telegraph company will not be responsible for the correctness of messages unless repeated, is not so far contrary to private interest or the public good, as to justify a court of justice in pronouncing it void.
2. As to the time when a contract becomes binding by letter or telegram discussed.

Rule for a new trial and motion for judgment on points reserved.

[U. S. District Court—Jan. 25, 1872.—*Hare, P. J.*]

This is an action against the Western Union Telegraph Company, to recover damages for a mistake committed by their servants in the transmission of a telegraphic message from Parkersburg, in West Virginia, to Philadelphia. The telegram as originally written by the plaintiff was as follows:

"Parkersburg, April 14th, 1865.

"To P. Edwards, 423 Walnut street, Philadelphia."

"I hold the Tibb's tract for you. All will be right."

Unfortunately, through some unexplained mistake or accident, an *s* was substituted for an *h*, so that the message when delivered in this city read, "I *sold* the Tibb's tract, &c." Edwards thereupon broke off the contract into which he had entered for the purchase of the land. The mistake was not discovered until the second or third of May, when the plaintiff came to Philadelphia, and had an interview with Edwards, who said that supposing the telegram to be correct, had made other arrangements.

The jury found a verdict for the plaintiff subject to the opinion of the court on the following points:

1. "Whether the defendants are liable in this case, the plaintiff not having insured the message nor directed it to be repeated, and

2. "That the form in which the telegram was transmitted by the defendants and received by Edwards, did not discharge Edwards from his liability as a purchaser under his contract with the plaintiff, and therefore, that the damages

sustained by the plaintiff were not a necessary or legal consequence of the default of the Telegraph Company.

"It being agreed that judgment should be entered for the defendants if the court in banc were of opinion with them on either point."

The first point grows out of the terms and conditions prescribed by the company for the receipt and transmission of all messages. These were, *inter alia*.

"In order to guard against and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be REPEATED, by being sent back from the station from which it is originally sent. Half the usual price will be charged for repeating the message, and while this company in good faith, will endeavor to send messages correctly and promptly, it will not be responsible for errors or delay, in the transmission of delivery, nor for the non-delivery of REPEATED MESSAGES beyond TWO HUNDRED times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid for at the time of sending the message. Nor will the company be responsible for any error or delay in the transmission of delivery, or for the non-delivery of an UNREPEATED message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risks stated thereon, and paid for at the time."

If this regulation is valid, there is obviously an end of the plaintiff's case. It is conceded that he knew of the rule, and did not require the message repeated. He cannot, therefore, make the defendants answerable in damages consistently with the terms to which he tacitly agreed. It is a general principle that a man who seeks to enforce a contract, shall not recover more than the contract gives. It is for him to consider, in entering into the obligation, what shall be the limit of the liability on the other side. If he assents to a provision that the opposite party shall not be answerable in a given case, or unless certain conditions are fulfilled, he cannot rely on the disadvantageous result of the bargain as a reason for relief.

This consideration might be conclusive, if the action were *ex contractu*, or founded solely on the agreement between the plaintiff and defendants. Such, however, is not the case. It is an action *ex delicto* for the breach of a duty which the defendants owe to every man, to receive the messages which he may wish to send, and transmit them to their destination. This obligation was anterior to the contract, and is not necessarily susceptible of being modified by it. Having its foundation in a rule of law, it cannot be varied or restricted, except in subordination to the principles on which the rule depends. The maxim *quilibet potest renunciare juri pro se introducto*, does not apply when the right in question is conferred on the individual with a view to his protection and for the common good.

The plaintiff calls for the application of this doctrine to the case in hand. The condition against liability for unrepeated messages, is in his eyes, one which the defendants could not legally impose. It is, as he contends, virtually a stipulation for immunity against the consequences of their own negligence, and therefore invalid.

If such be the nature of the regulation, it cannot operate as a defence. The defendants are public agents, and as such bound to the exact diligence which is the condition precedent of all faithful service. Their charter was not conferred upon them merely as a means whereby gain might accrue without the risk incident to individual responsibility. It is a great and beneficial franchise confined to their hands for the better attainment of an object in which the community at large are interested. They are, therefore, not less than a railway company or a corporation organized to supply gas or water, under an obligation to exercise their peculiar function in a way to attain the end proposed, and must respond in damages to every one who is injured by a want of due care on their part or on that of the agents whom they employ. This, as the case of the *Telegraph Co.* v. *Dryburg* 35 Penna. 298, indicates, is true not only as it regards those who contract with them but of third persons who having entered into no relation of contract, are yet injured by their negligence.

The fundamental truth of the plaintiff's contention, is, therefore, undeniable; but, like most truths, it is limited by other and collateral principles. A railway, telegraph or any other company charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence, but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare if they are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such, as that reason, which is said to be the life of the law, can approve; or at the least, such as it need not condemn. By no device can a body corporate avoid liability by fraud, for wilful

wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bonds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule, which, in marking out the path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and as such, upheld by the courts.

Applying this test to the case in hand, does the evidence disclose any sufficient ground for overruling a defence which is *prima facie* valid? The burden of proof is on the plaintiff. It is for him to show in what respect a regulation which he tacitly accepted, is so far hostile to the interest of the community, or of that portion of it which uses telegraphy as a means of communication, that the law should not suffer it to stand. Unless this is so clear as to be legally indisputable, the judiciary should obviously refrain from interfering with the contract as framed by the parties, and refer the subject to the legislature, who can at any time regulate the whole by statute.

We are fully aware of the importance of the question, and have no desire to relax the just measure of accountability in cases of this description. Telegraphy, like the other powerful instruments which science has placed at the disposal of man, is capable of being a source of injury instead of benefit. That the intelligence which it conveys is prompt, will serve no good purpose, if mistakes occur during the process of transmission. The difficulty of avoiding them is, notwithstanding, greater than might at first appear. The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder-storms, and other natural causes. It is, therefore, obvious, that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came.

So far the inquiry is plain; but here a question of some difficulty presents itself. Should every message be repeated, or only those which are of sufficient importance to make such a precaution requisite. In answering this question it must be remembered that the repetition of a message necessarily involves delay and expense. The mail may transmit any number of letters simultaneously, but a telegram has exclusive possession of the wires during its passage over the line. While one message is repeated, others are delayed, which at times may be of serious consequence. There is, moreover, an increase of cost, which, though trivial in each instance, would be formidable in the aggregate, and necessarily augment the rate of charging in a ratio which has been roughly calculated at one-half. Such must be the result, if every one who wishes to engage rooms at an hotel or put a question of friendly interest, must submit to the expense and possible delay of repetition.

On the other hand, the convenience of the opposite course is not less manifest. Instead of passing every message twice over the line, those only are to be repeated which from their importance demand peculiar care. And as the company cannot know what telegrams fall within this category, the question is referred to the person chiefly interested. Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition. If it were not, the

company would in all probability be called on to repeat every message, with the inevitable effect of putting the public to an increased expense, without any corresponding gain.

We are, therefore, inclined to think that the regulation in question, or at least so much of it as has been considered in this opinion, is well calculated to reconcile the economy and despatch which the mass of the community principally desire, with the security against accident which each individual is entitled to demand. But we limit ourselves to saying that it is not so far contrary to private interest or the public good, as to justify a court of justice in pronouncing it invalid.

We have not arrived at this conclusion without a just diffidence arising from the novelty of the subject and the want of any controlling authority in this State. But it is satisfactory to know that the principles set forth above are sustained by the judgment of the Supreme Court of Massachusetts, in *Ellis* v. *The Telegraph Co.*, 13 Allen, 226; and also by that rendered in *Camp* v. *The Telegraph Co.*, 2 Metcalf, Ky., 164.

We do not think it requisite to notice the second point, beyond saying that it presents a nice question, about which the books do not agree: See *Harris's* Case, Law Reports, 7 Chan. Appeals, 587; and the *British and American Telegraph Co.* v. *Colson*, Law Reports, 6 Ex. 108. The fair deduction from the authorities seems to be, that although an offer made through the post-office becomes binding as soon as the assent of the person to whom it is addressed is signified by mailing a reply, the contract is still subject to this condition, that the letter of acceptance shall reach its destination; and will fail if the opposite party does not receive notice within a reasonable time in that or some other way. The principle is the same, when a telegram is altered in passing over the line, and misleads a purchaser. We do not, however, express any opinion on this head, and leave it for the consideration of the court above. In deciding that the company is not answerable for unrepeated messages, we have in effect disposed of the whole controversy, and judgment is consequently entered for the defendant on the points reserved.

Judgment for the defendants.

We are pleased to notice by some of our exchanges that Mr. H. J. Morgan, of the Secretary of State's office in Ottawa, better known as the author of several useful Canadian works, has been called to the Bar of Quebec. At one time he held a very humble position in the Civil service, but by dint of industry and ability has already raised himself to a position of which he may feel justly proud. His example is one that we would like to see more generally followed by young men who enter the Civil service. Many of those who enter the service, being void of ambition, lead a sort of hum-drum existence, without any effort to utilise their leisure, of which they have a good share, by engaging in literary pursuits or in fitting themselves for the higher positions to which they should naturally and properly aspire.

A money bond void on payment of the money by instalments is not within either the Statute 4 & 5 Anne, c. 16, s. 13, or the Common Law Procedure Act 1860, s. 25, and a plea of payment into court of money sufficient to satisfy the claim of the plaintiff in respect of the unpaid instalment for default in payment of which the action is brought is bad.—*Preston* v. *Dania et al* 27 L. T. Rep. N. S. 612.

Mowat's Administration of Justice Bill, noticed in another place, we have learned, barely in time to mention, has passed the third reading with very few alterations. The body of the Act will not come into force till 1st January next. This is desirable; though, in suggesting a postponement, we did not contemplate so long a day: it will afford practitioners ample time for a deliberate and careful examination, and we hope to be able to give some exposition of its provisions assisting to its successful working.

No doubt a measure making such important alterations in procedure may be seriously clogged, if not blocked, by a hostile feeling on the part of those who have to work it out, and the hearty co-operation of the judges and the bar is always a great aid to success. We have no doubt that will be given to the new law, and we think the Attorney-General has acted wisely in postponing its operation. Secs. 53, 54, and 55 will come in force at once.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

Robert Herbr Bowes.

Allan John Lloyd:

James R. Roaf.

John George Killmaster.

Isaac Baldwin McQuesten.

And the following Gentlemen received Certificates of fitness :

R. McMillan Fleming.

J. Bruce Smith.

J. George Killmaster.

James R. Roaf.

Allan J. Lloyd.

Isaac B. McQuesten.

Peter Cameron.

Rupert E. Kingsford.

Alexander Sampson.

Wickstead.

And on Tuesday, the 4th February, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

James Joseph Wadsworth, M. A.

Alexander Haggart, B. A.

Samuel Clarke Biggs, B. A.

Elliott Travers, B. A.

Julius Lefevre, B. A.

Junior Class.

Charles H. Connor.

Thomas G. Meredith.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding. —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR MAY.

1. Tues... Assessors in Cities and Towns to comp. Roll by this date. Clerks of Mun. to make return to County Treasurer lands taken up during last year, and certify taxes due thereon.
3. Sat.... Candid. for Att'y to leave Art., &c., with Sec. of Law Soc. Co. Treasurers to make up arrears of taxes on lands.
4. SUN... *3rd Sunday after Easter.*
6. Tues... Siege of Quebec raised, 1776. Primary examination of Articled Clerks and Students.
10. Sat.... Treaty of peace bet. France and Germany, 1871.
11. SUN... *4th Sunday after Easter.*
15. Thurs.. Last day for ser. for Co. Ct. Exam. for call with Honors. Candidates for call to pay fees and leave papers.
16. Fri.... Examination of Law Students for call to the Bar.
17. Sat.... Exam. of Articled Clerks for admission as Attorneys.
18. SUN... *5th Sunday after Easter.*
19. Mon... Easter Term begins. Articled Clerks and Students to give notice for inter-examination.
22. Thurs.. Inter-examination Law Students and Articled Clerks.
23. Fri.... Paper Day, Q.B. New Trial Day, C.P.
24. Sat.... New Trial Day, Q.B. Paper Day, C.P.
25. SUN.... *1st Sunday after Ascension.* Fenian skirmish at Eccles Hill, 1870.
26. Mon.... Pap. Day, Q.B. N.T. Day, C.P. Last d. to decl. for Co. Ct.
27. Tues... New Trial Day, Q.B. Paper Day, C.P.
28. Wed... Paper Day, Q.B. New Trial Day, C.P.
29. Thurs.. Open Day, Q.B. Paper Day, C.P.
30. Fri..... New Trial Day, Q.B. Open Day, C.P.
31. Sat..... Open Day, Q.B. Open Day, C.P.

CONTENTS.

EDITORIALS:

Retirement of Lord Romilly..... 137
Death of Sir Chas. Marshall 137
Long Judicial Service in Canada..... 137
Canadian Bar at Privy Council..... 137
Increase of Judges' Salaries..... 138
Missing Library Books..... 138
Mr. Justice Ludlow and Marriage..... 138
The Administration of Justice Act, 1873..... 138
Division Court Accommodation..... 139
"Single Seated Justice" in Criminal Cases..... 140
The Last Evidence Act of Ontario..... 142
Travelling by Rail..... 143

SELECTIONS:

The Supreme Court of Judicature Bill..... 149
Juries..... 150
Lawyers in Parliament..... 152
Judah P. Benjamin..... 153
The Great Unpaid..... 153
Judicial Appointments of Oxford and Cambridge Universities..... 154
Genius of Dr. Lushington..... 154
The Reporters and Text Writers..... 155

CANADA REPORTS:

Ontario:

Chancery Chambers:

Notes of Recent Decisions..... 159

UNITED STATES REPORTS:

Supreme Court:

Bradstreet & Son v. Everson, Preston & Co... 161

REVIEWS:

American Law Review..... 163

LAW SOCIETY OF UPPER CANADA..... 164

THE

Canada Law Journal.

Toronto, May, 1873.

Lord Romilly, Master of the Rolls, has retired from the Bench after serving in that capacity for twenty-two years. He was in many respects an admirable Judge, but had the unfortunate peculiarity of leaving a large percentage of his decisions on important points reversed or varied on appeal. It is said that Sir George Jessel, the Solicitor General, will succeed him.

The distinguished position which a very large proportion of the Reporters in the English Courts have attained in the profession, is illustrated in the case of Sir Chas. Marshall who died in February of this year, at the age of 84 years. He edited an edition of Marshall on Insurance, and was the author of the reports in the Common Pleas cited by his name. During his life, he was for some years Chief Justice of Ceylon, and was knighted at the time of his appointment.

A valued correspondent reminds us that we need not go out of our own country to award the palm of long service on the Bench. The late Mr. Bowen was appointed a Puisne Judge of the then Court of Queen's Bench for Lower Canada in 1812, and he died Chief Justice of the Superior Court for Lower Canada, in 1866. He therefore sat as a judge for a period of fifty-four years. He had been Attorney-General for some few years before he was appointed to the Bench.

In a recent appeal to the Privy Council from the Province of Quebec, we notice

that Mr. Dorion, Q. C. (of the Canadian Bar), appeared for the respondents. It appears from the report (*Herse* v. *Dufaux*, 21 W. R., 313,) that he was accorded precedence in like manner as is granted to members of the English Bar who wear silk. It is worth while noting the fact that the English Judges respected the dignity conferred by the Colonial Government, and granted pre-audience to Mr. Dorion in consequence thereof.

In the Colony of Victoria, the Parliament, finding that a salary of £2,600 was not sufficient to secure the best legal talent for the Bench, has raised the salary of Puisne Judges to £3,000 and that of the Chief Justices to £3,500. Here is an example which may well be imitated in the Dominion of Canada. We are glad to notice from the remarks of Sir John Macdonald and the concurrent observations of Mr. Blake, that the attention of both sides of the House has been called to the question of making some addition to judicial salaries, and we trust that the Session will not be allowed to pass without an amendment of the law in this respect.

We are comforted by observing, in a Philadelphia exchange, an advertisement of the Law Librarian requesting the return of missing books, in number about one hundred and fifty. The Librarian of the "City of Brotherly Love" puts it very nicely indeed, by requesting gentlemen who have borrowed books from the Library to examine their book-shelves and return any volumes that may have been overlooked theretofore. The pilferings from the Law Library in this city were at one time tolerably extensive, but by the admirable supervision of Mr. Esten, the present librarian, the loss of a volume is becoming quite an exceptional occurrence.

THE ADMINISTRATION OF JUSTICE ACT, 1873.

The Administration of Justice Act is now on the statute book, and we believe it will effectually serve the purpose for which it was designed. Several alterations in the Bill as published by us were made in committee before it finally passed, some clauses were added, one was struck out, and the numbering of the clauses was in part changed. The following sections (according to numbering in *bill*) passed without alterations, viz:—1 to 12, 14 to 16, 19, 20, 22, 27, 29, 30, 32, 34, 39, 41, 43 to 45, 47 to 55, 57 and 58. All the other sections are altered, some of them very materially. There will be ample time for the examination of all the sections, for the body of the Act does not come into force till the 1st January, 1874. There are nine sections which come into force at once, viz:—46, 47, 51, 56, 57, 58, 62, 63, and so much of 59 as relates to County Court sittings in September. These we subjoin. The numbering is as in the Act:

46. All issues of fact and assessments of damages in actions in any county court may be tried and assessed at the sittings of assize and *nisi prius* for any county other than that in which the venue is laid, upon an order being obtained for that purpose; and such order may be granted upon similar grounds to those upon which an order changing the place of trial would be granted in the superior courts of common law.

47. In case of there being a junior judge for the county, such junior judge may preside over all or any of the courts of the county, when the senior judge is not present, and shall, as regards any such courts, have the same duties, powers and authority as the senior judge.

51. The judges of the Superior Courts of Common Law, or any four of them, of whom the chief justices shall be two, shall have the like power of making general rules or orders for the effectual execution of this Act, as are conferred upon them by the three hundred and thirty-third, three hundred and thirty-fourth and three hundred and thirty-eighth sections of

the Common Law Procedure Act with reference to matters contained in the said Act: and the judges of the Superior Courts of Common Law, or any three of them, of whom one of the chief justices shall be one, shall have the like power of making general rules or orders, with reference to matters contained in this Act, as are conferred upon them by the three hundred and thirty-ninth and three hundred and fortieth sections of the Common Law Procedure Act with reference to matters therein contained; provided that it shall not be necessary that any general rules or orders made under the powers conferred by this Act, or any general rules, orders, or regulations hereafter made under the powers conferred by the Common Law Procedure Act be transmitted to the Governor, in the manner directed by the three hundred and thirty-fifth section of the last mentioned Act.

56. When the judge of the county court, or the junior or the deputy judge (as the case may be) officiating in the office of county court judge, is present, it shall not be necessary, in order to constitute a court or sittings of the general sessions of the peace, or a quorum at any sittings thereof, that any associate or other justice of the peace should be present at such court or sittings.

57. The judge of every county court, or the junior or deputy judge thereof, authorized to act as chairman of the general sessions of the peace for any county, is constituted a court of record for the trial, out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions, and without a jury; and the court so constituted shall have the powers and duties which the Act passed in the session of the Parliament of Canada held in the thirty-second and thirty-third years of Her Majesty's reign, and chaptered thirty-five, purports to give, so far as the Legislature of this Province can give the same; and every judgment, proceeding, act, matter, or thing heretofore had or done under or by virtue of the said Act, shall be held to be as valid as if the said Act had been an Act of the Legislature of this Province.

58. The court constituted by the preceding section shall be called "The County Judge's Criminal Court" of the county in which the same is held.

59. In addition to the sittings of the courts of general sessions of the peace and of the county court of the County of York, now held in and for the County of York, there shall be held in each year a fourth sittings thereof respectively, to be held on the second Tuesday in September of each and every year; and the sittings of the said general sessions of the peace and of the county court of the County of York now by law directed to be held on the second Tuesday in the month of June, shall be held on the second Tuesday in the month of May, including the present year, and all provisions of law relating to jurors and juries, and other matters shall apply to such additional and altered sittings respectively, in the same manner as to the present sittings heretofore held of such courts respectively.

62. Section five of the twenty-seventh chapter of the Consolidated Statutes for Upper Canada is hereby repealed, and the following substituted therefor:

(5.) Such notice may contain any number of modes in which title is set up: Provided always that the opposite party shall be at liberty to apply to the court or a judge to strike out any mode upon the ground of embarrassment or delay; and at the trial the claimant shall be confined to proof of the title set up in the notice; but the claimant shall not be required to set out in such notice the date or particular contents of any letters patent, deed, will or other instrument or writing which shows or supports his title, or the date of any marriage or death, unless it be specially directed by order of the court or a judge.

63. The Lieutenant-Governor in Council may appoint that sums not in any case exceeding six hundred dollars nor less than one hundred dollars yearly shall be paid out of moneys to be hereafter voted by the Legislature for this purpose, as and for the salaries of the deputy clerks of the Crown respectively.

DIVISION COURT ACCOMMODATION.

It is satisfactory that provision has at length been made respecting Division Court accommodation. A clause in the Consolidated Municipal Act, which has just been passed, makes it the duty duty of Municipalities in which Division Courts are held to furnish a Court Room and "necessary accommodations" for holding the Court, *not in connection with any Hotel.*

Hitherto when Municipalities did not

properly appreciate the importance of giving accommodation, a little gentle pressure had to be brought to bear, but it was not pleasant to the judge to find it necessary to say "if you do not furnish a room for holding the Court, and an office for the Clerk and fuel, &c., in the winter season, I will move the Court to another place where they will."

Now it is made a statutory duty, and we hope Municipalities will make decent, nay, generous provision for the accommodation of "The People's Courts."

"SINGLE SEATED JUSTICE" IN CRIMINAL CASES.

We have in this Province peculiar and unique Criminal Courts of recent creation. In a former number of the *Law Journal*, we entered very fully into the nature of these Courts, and pointed out in detail the benefits likely to spring from their operation. We could only at the time reason in a general way on the subject, for the law had not then been tested. Several of the judges took the same favorable view in addressing the grand jurors. We are now able to speak upon actual returns of the work they have been doing.

In the Province of Quebec similar tribunals exist, but they have not yet been created in the Provinces of Nova Scotia, New Brunswick, British Columbia, or Manitoba, and before therefore noticing the work done by them in Ontario, we would in general terms and without regard to technical details briefly refer to the jurisdiction and procedure in these Courts in Ontario.

The chief feature is that jurisdiction is given to *a single Judge without a jury* to hear and determine, with some three or four exceptions, all indictable offences, felonies and misdemeanors, known to the law, excepting offences punishable with death.

The procedure is simple and speedy. After a prisoner has been fully committed for trial, the Sheriff of the locality reports the case to the Crown attorney, a resident barrister appointed by the crown in each county for the purposes of criminal justice. Upon this report the Crown attorney applies to the resident judge for his order to bring up the prisoner at some convenient day, usually within a week, by which time the information and examinations will have come into his hands. Upon these the Crown attorney frames an "Act of Accusation," in the nature of an indictment or criminal information, and the prisoner being brought before the judge sitting in open court on the day appointed, the accusation is read to him, and he, the prisoner, has the right to elect how he will be tried, by the judge alone or by a jury. If he desires to be tried by a jury, he is remanded for trial till the next sittings of the ordinary criminal courts; if he elects to be tried by the judge his plea is taken. If he pleads guilty sentence is at once passed; if he pleads not guilty, an early day is appointed for the trial, which always takes place at the court house, in open court. At the trial the Crown is represented by the Crown attorney, and the prisoner is entitled to his defence by counsel. Only barristers have audience in the court. The trial is conducted according to the practice at the ordinary courts, and the punishment on conviction is the same; indeed the only difference is that there is no jury, the judge alone hearing the evidence and determining the facts, &c., of the case. If the prisoner be convicted "the sentence of the court" is usually prayed at the time, and at once passed.

A return to the Legislature of Ontario for the year 1871, of prisoners committed for trial in this Province, shows the nature of the offences, the cases tried by the judge without jury, those tried by a jury, and the result under each head.

Judge Gowan, in a recent address to the grand jury in the County of Simcoe, gave a very full exposition and analysis of this return, and the figures he brought out, which we use, present some interesting features. Looking at the learned judge's figures, we are able to say, that the opinion we hazarded as to the value of these new tribunals has been very fully sustained, and the return incidentally furnishes proof that trial by jury is not so popular even in criminal cases, as some would have us to suppose. Of 936 persons committed for trial during the year, no less than 742 or say 80 per cent. preferred to be tried by a judge rather than by a jury. No doubt allowance must be made for the fact that in some cases the prisoner could within a week or ten days after being committed obtain his trial instead of waiting perhaps for three months for the regular sittings of the ordinary criminal courts, but this inducement would only apply when the prisoner could not obtain bail in cases bailable; but it is quite evident that a very large number must have preferred being tried before a judge alone. It is very noticeable that a considerable number of the cases tried before the judges were of a serious character, and in some counties every prisoner committed elected to be tried without a jury; indeed in nearly all the counties the claim to be tried by a jury was the exception.

In the counties including the large cities, it was otherwise, for at Toronto of the 99 committed, only 56 consented to be tried by the judge. At London of the 89 committed, but 49. At Hamilton of 79 committed, 60 preferred to be tried by the judge alone. But taking three counties having the largest number of commitments, the figures show as follows:—

Simcoe, 42 committed, 37 elected to be tried by judge.					
Brant, 39	"	35	"	"	"
Norfolk, 37	"	26	"	"	"

In the three counties, including the Cities of Toronto, Hamilton and London, the number of commitments was 267; of these 165, or about three-fifths, elected to be tried by the judge. In all the rest of Ontario the number committed for trial was 669, of whom the large number 577, over five-sixths, claimed the right to be tried by the judge alone without a jury. As might be expected, crime in the counties first named bears a large proportion to the total for Ontario, 267 to 669, or nearly two-fifths of the number of commitments for trial in the whole Province.

Looking to results of trial by judge and trial by jury at the ordinary courts, we find the following figures: 573 convictions in 742 tried by judges, a little over 77 per cent.; 98 convictions in 194 cases tried by juries, but 50 per cent.

Again distinguishing between the three counties which include the cities named, and all the other counties in the Province together—in the former, of 267 tried by the judges, 107, say two-fifths, were convicted; of 165 tried by the jury, 102, say three-fifths, were convicted. In all the other counties, of 577 prisoners tried by judge alone, 466, or nearly five-sixths, were convicted; of 92 tried by jury, 55, or nearly three-fifths, were convicted.

In analysing the return for the whole Province for a classification of the crimes in cases tried by the judge, we find the following results: 92 cases of offences against the person more or less serious; 45 of offences against property, accompanied by violence; 542 cases of larceny, and kindred offences, unaccompanied by violence; 6 offences connected with railways, and 11 cases of minor offences. There is some difficulty in an exact classification from defective returns, but the above figures are very close to the mark.

We do not now pause to reason on the facts disclosed by the figures before us, and

shall content ourselves with remarking at present that one solitary case of assault upon a policeman in a whole year speaks of ready submission to subordinate ministers of the law; but three cases of indecent assault tell favorably for the morals of Upper Canadians; and but two cases for obstructing a railway, with about 4,500 miles of rail in the Province, a considerable portion through a partially settled country tells its own story. On the other hand, perhaps 52 cases of assault, and some 16 cases of aggravated assault, would show a little pugnacity amongst our people. We have no return as to the cases cognizable in other courts and how disposed of, but they are comparatively few in number.

THE LAST EVIDENCE ACT OF ONTARIO.

Some of the legislation of the Local House for this Province has not passed through a very favourable ordeal before the Judges. In the *Goodhue* case it was more than hinted that Lord Tenterden's observation touching the legislation of his time was applicable to the Ontario Parliament, and that of it, too, it could be said that it was "*magnas inter opes inops.*" We are persuaded that a more satisfactory expression of opinion will be accorded by the bench to the Act to amend the law of evidence of 1873. The principal features of change in this Act—those, namely, relating to the admissibility of the evidence of husband and wife, and the provision for the reception of evidence of matters occurring before the testator's death in suits by or against executors, have been before advocated in this journal, as well as recommended by individual judges.

The first section enacts that in any civil suit or action, the husbands and wives of the parties thereto shall be competent and compellable to give evidence therein; save that, as provided by the second section, neither shall be compellable to disclose any communication made to the other during the marriage. This, of course, leaves it to the option of the husband or wife to disclose such quasi-privileged communications, but if so advised, either may decline to answer any questions on matters of this kind. The difference between competency and compellability to testify was discussed by Spragge, then V. C., in *Peterborough* v. *Conger*, 1 Chan. Cham., R. 35.

There is also a further exception introduced in the third section, by which neither husband nor wife can give evidence for or against the other "in any proceeding instituted in consequence of adultery." By the fourth section the party opposing or defending, or the husband or wife of such party, is rendered competent and compellable to give evidence in all proceedings, matters, or questions *not being crimes*, under Acts relating to Licenses or Municipal Institutions or assessments, &c., or on trials before Justices of the Peace and other judicial officers of summary jurisdiction. Some very nice questions have arisen upon "what is a *crime?*" It is remarked in a late case, "there would seem to be little doubt that the violation of a public Statute, and more particularly so when that violation is spoken of as an *offence* and is punishable by fine or imprisonment, as substitutionary for the fine, is a *crime* in law, and the proceedings taken against the party are criminal proceedings:" *Re Lucas*, 29 U. C. Q. B. 92. In Powell on Evidence, where the author comments on the doctrine laid down in *Attorney General* v. *Radloff*, 10 Ex. 84, it is observed thus: "Where the imprisonment follows on default of the payment of a fine, it may be regarded in the nature of an execution; and the deprivation of personal liberty would be quite consistent with the character of the Act as a civil

proceeding. But where it may follow by the direct legal consequence of the offence, it would involve the anomaly of making the offence civil or criminal according to the preliminary view which the magistrate chose to take of the complaint" (*p.* 29.)

The next section repeals sub-section (*e*) of section 5 of the Evidence Act of 1869, and the last section, which was added, we believe, in committee provides that in suits by or against the representatives of persons deceased, the evidence of the opposite party in respect of any matter occurring before the death of such deceased person shall not be sufficient to obtain a verdict upon, unless it be corroborated by some other material evidence. Till quite recently, this might be said to be the well understood rule of the English and Irish Courts. It has been decided again and again that the Court is not prone to act on evidence of conversations with a deceased person, and will never give a plaintiff anything upon his own uncorroborated statement against another after that other's death: See *Rogers* v. *Powell*, 38 L. J., N. S.; *Hartford* v. *Power* Ir. L. R., 3 Eq. 602; and see the cases cited in *Northwood* v. *Keating*, 18 Gr. 669. In one of the cases there noted *Grant* v. *Grant*, 34 Drew 623, the Master of the Rolls laid it down broadly that the Court will not act upon the unsupported testimony of a claimant upon the estate of a person deceased. To this, however, exception has been taken by Wickens, V. C., who says in *Browne* v. *Collins*, 21 W. R. 222, that he considers such evidence though unsupported, admissible, and that in giving effect to it, the nature of the case and a great many other circumstances may very much affect the feeling of the Court, as a juryman, on the subject.

TRAVELLING BY RAIL.

[continued.]

As a general rule, which however has exceptions as every other general rule, it may be assumed that carriers—including Railway Companies—are bound, generally speaking, either to make actual delivery of the goods carried by them, or to give notice to the consignee of their safe arrival and afford him reasonable time and opportunity to see to his property and provide for his own interests, before the responsibility for the safety of the goods which rests upon them terminates: Macaulay, J. in *McKay* v. *Lockert*, 4 O. S. 407. And this doctrine was affirmed by Draper, C. J., in *O'Neill* v. *Great Western R. W.*, 7 C. P. 207. But when the Company has nothing further to do with the goods as carriers, they have no further responsibility attaching to them as such. *Shepherd* v. *Bristol and Exeter R. W.*, L. R. 3 Ex. 189. And where a company received goods in Buffalo to be carried by them as common carriers to Brantford, and at Brantford the goods were burnt up with the bonded warehouse in which they were stored under control of the Company, the defendants, the Court of Common Pleas held that the defendants' liability as common carriers had ceased upon the goods being stored in the warehouse, where, in the contemplation of the parties, they were to be placed, and that they then became liable as warehousemen, and were therefore not liable as common carriers for the loss sustained by the plaintiff; nor were they bound to give plaintiff notice of the arrival at Brantford station, as the plaintiff was not entitled to demand or receive them except through the custom-house officer: *Bowie* v. *Buffalo, Brantford and Goderich R. W.*, 7 C. P. 191. In *O'Neill* v. *Great Western R. W.*, 7 C.P. 207, and *Inman* v. *Buffalo and Lake Huron R. W.*, 7 C. P. 325, it was clearly laid down that in case of bonded goods the Railway Com-

pany's duty as common carriers was ended on the deposit of the goods in a bonded warehouse. In the latter case Draper, C. J. said, "the terminus of the transport being reached, the duty of common carrier is fulfilled by placing the goods in a safe place, alike safe from the weather and from danger of loss or theft, and whatever the responsibility the company incur if that safe place is one under their own charge and control, it assuredly is not the responsibility of a common carrier."

From these cases it is evident that a traveller who leaves his baggage behind him at the station on his arrival at his journey's end, thinking that so long as he retains his checks all is right, leans upon a broken reed and may find that both his baggage and his right to recover damage therefor from the Railway company has vanished like a morning mist before the rising sun.

In fact such was the actual experience of one Penton, who left Paris by train, for Seaforth, the possessor of two trunks: his baggage came safely to the latter place about three in the afternoon and was put upon the platform of the station. After a time P. helped the baggage-master to carry the trunks into the baggage-room; he then entered the bus and rode in it to the village inn, and there was nothing to have prevented him taking his baggage with him had he so chosen. In the evening, about eight o'clock, he sent his checks down for the trunks, but one had disappeared, and the evidence went to show that it had been stolen, for some weeks afterwards it was found at Clinton dispoiled of its contents. In an action against the company to recover the value of the lost articles, the jury gave him a verdict for $57.20. In term a new trial was ordered, upon payment of costs; this was appealed against, and after argument it was held that the defendants were not responsible; that their duties as common carriers ended when the trunks had been placed on the platform and the plaintiff had had a reasonable time to remove them, as he clearly had here, there being no necessity for his putting them into the baggage-room; a nonsuit was therefore directed: *Penton* v. *Grand Trunk R. W.*, 28 U.C.Q.B. 367. In *Campbell* against the same company, argued during Hilary Term of this year, the plaintiff took a ticket at London and checked his baggage to Toronto: he stopped on the way so that when his trunk arrived at Toronto he was not there to receive it. The company placed it in their baggage-room, whence it was stolen after two days: the Court, without hearing counsel for the defendants, made absolute a rule *nisi* for a nonsuit.

Where it is proved to be the custom of the porters in the employ of the company to assist passengers at the station to obtain cabs within the station grounds, and place their baggage therein, the liability of the company will be somewhat extended. Thus, where this custom prevailed, the plaintiff had with him in the car a carpet-bag containing a large sum of money, and he kept it in his own possession until alighting at the terminus in London. On stepping out of the carriage with the bag he suffered a porter of the company to take it from him, for the purpose of securing a cab. The porter having found a cab within the station grounds, placed the bag in it, and returned to the platform to get the other baggage of the plaintiff. Meanwhile, cabby disappeared, and the bag and all that was therein were lost. It was held that this was a loss through the neglect of the company, and that they were liable therefor in damages: the court considering that the bag had been delivered to the company to be carried and that there had been no re-delivery to the plaintiff, and being unable to distinguish between this and the dressing-case in *Richards* v. *Lon-*

don, B. & S. C. R. W.: *Butcher* v. *London & S. W. R. W.* 16 C. B. 13.

It has been held in England that when there is one entire contract to carry a passenger and his baggage partly by land and partly by sea, the contract is divisible, and that as to the land journey the carrier is within the protection of the Carrier's Act (11 Geo. IV. c. 4 and 1 Wm. IV. c. 68.) So that a man travelling from Jersey to London, having lost a chronometer in the cars at Southampton, sued in vain for compensation, he not having complied with the requirements of the Act: *Le Conteur* v. *London & S. W. R. W.* L. R. 1 Q. B. 54.

A railway company's liability sometimes extends beyond its own lines; for if they undertake the transportation of goods, and book them for a place beyond the terminus of their road, they will be liable for a loss, though it occurs while the goods are in transit over the rails of another company, to whom they transferred them, and necessarily so, for conveyance to the place of destination: *Muschamp* v. *Lancaster & Preston Junction R. W.*, 8 M. & W. 421: and see also *Scothorn* v. *South Staffordshire R. W.*, 8 Ex. 341. The receipt of the goods so to be carried is *prima facie* evidence of the liability of the company: *Watson* v. *Ambergate, N. & B. R. W.*, 15 Jurist 448. These decisions have been followed in several American cases, but latterly some of the courts in that republic have held, that the responsibility is only *prima facie* and may be controlled by general usage among carriers, whether such usage be known to the person sending or not; and Patterson J., in *Watson* v. *Ambergate, N. & B. R. W.* said that the company were liable unless the facts shewed that their responsibility had determined.

The liability of the company may be controlled by special agreement, as *modus et conventio vincunt legem*; so where the South Eastern R. W. Company had upon their through tickets from London to Paris, the words "The S. E. R. W. Co. is not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the S. E. R. W. Co.'s trains or boats;" and the plaintiff took such a ticket, though he signed no memorandum—his portmanteau being lost between Calais and Paris on a French line, he sued the S. E. Company in vain, they being protected by the conditions on the ticket. However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print, upon the ticket which he gets at the last moment, after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer; however hard it may appear that a man shall be bound by conditions which he receives in such a manner as this, and, moreover, when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed,—still we are bound, on the authorities, to hold that when a man takes a ticket, with conditions on it, he must be presumed to know the contents of it, and must be bound by them: Cockburn, C. J., in *Zunz* v. *South East. R. W.*, L. R. 4 Q.B. 539. A contract entered into with a common carrier by the party who delivers the goods to be carried, which exempts the carrier from all liability for any loss occasioned by his negligence, is binding upon the parties: *Carr* v. *Lancashire & Yorkshire R. W.*, 7. Ex. 707; and see *Austin* v. *Manchester, Sheffield & Lincoln R. W.*, 10 C. B. 454.

Where a company is in the habit of receiving passengers at the station of another railway for transportation on their

own, it is their duty to have an agent on the spot to see to such passengers, and if they do not, but allow any one else to act for them, they will be held responsible for the loss of luggage committed to the care of the person so acting for them for delivery on their line: *Jordan* v. *Fall River R. W.*, 5 Cushing 70.

If a servant carries his master's luggage with and as his own, and the company receive it as the ordinary luggage which his ticket entitles the servant to carry; if the luggage is lost the master cannot recover, although he may have travelled by the next train without any baggage at all, for the contract is with the servant alone: *Becher* v. *Great Eastern R.W.*, L.R. 5 Q. B. 241: *quære*, could the servant recover, the luggage not being his?

Occasionally the monotony and tedium of a trip is broken and relieved by the sound of a strife of tongues, arising above the din and rattle of the train, and the sight of a conductor struggling either with some poor unfortunate who, having nothing to pay, is endeavoring to reach his desired haven without possessing a talismanic ticket, or with some witty one who has been attempting to palm off a bogus pass or ticket as a *quid pro quo*. Such the conductor is entitled to eject, for the twelfth subsection of section 20 of Railway Act 1868, lays down clearly that "any passenger refusing to pay the fare, may by the conductor of the train and the servants of the company be put off the cars, with his luggage, at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force." Sometimes, however, a conductor is too hasty and errs through excess of zeal, and one with a right to enjoy all the privileges of transportation, is improperly and unlawfully compelled to quit the cars and is left disconsolate and alone beside the track, while the train thunders past him. If one is ejected unlawfully he has a full remedy at law, for trespass lies against a company for an assault (and the putting out is so considered,) committed by their servants authorized by them to do the act. Such authority, although not given by an instrument under seal, is binding upon the company: *Eastern Counties R. W.* v. *Brown*, 6 W. H. & G. 314.

The rule is the same between a private person and a railway company as it is where the same matter is in dispute between two private individuals; and the general rule is that a master is not liable for the tortious acts of his servant, unless that act be done by an authority, either express or implied, given him for that purpose by the master: so that the plaintiff is bound to show that the person who turned him off the cars was, not only a servant of the company, but also, that he had authority so to treat him, or that such conduct towards him has been subsequently ratified by them: *Roe* v. *Birkenhead, Lancaster, &c., R. W.* 7 W. H. & G. 36. An assault committed on behalf of, and for the benefit of, a corporation is capable of being ratified by them, and if ratified renders them liable in trespass for the act: *Eastern Counties R. W.* v. *Brown, ante.* A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment: *Bayley* v. *Manchester, Sheffield, &c., R. W.*, L. R. 7 C. P. 415.

In the absence of anything to the contrary the court must assume that the conductor is the agent of the company,

authorized by them to do all legal acts for the proper management of the business of collecting the tickets and the fares of the passengers, preserving order and regulating the running of the train; and authorised by them, as well as by act of parliament, to remove persons from the cars who misconduct themselves or have not paid their fare. This being within the scope of his authority, if, in assuming to carry out what he is legally empowered to do, and in relation to which he must be considered the general agent of the company, he forcibly removes a passenger from the cars who has paid his fare, without any excuse for so doing, he will be liable for the assault, and the doctrine of *respondeat superior* applies to his employers, the company: *Williamson* v. *Grand Trunk R. W. Co.*, 17 U. C. C. P. 615. But if during the course of such removal, and while leaving the carriage, the aggrieved party should slip, fall, and be injured, the company will not be liable to him for such injuries so sustained by him; for the removal was not the proximate, but only the remote cause of the accident, and damages, if awarded, would be too remote: (*Ibid*). If one is about to be thus unceremoniously treated it will be wise and prudent quickly to gather together all his surroundings and belongings, and quietly succumb to the powers that be; for *Glover* v. *London & South Western R. W.*, L. R. 3 Q. B. 25, decides that special damages cannot be recovered, as a usual thing, for articles left behind in the train on such occasions. There a traveller was put out of the cars without unnecessary violence, and left on the seat he had been occupying a pair of glasses; but as it was not shewn that the company's servants got possession of them, it was held that he could not recover their value. Cockburn, C. J., in giving judgment remarked, that the case would be very different in his judgment, if the glasses had fallen from the plaintiff's person as the immediate result of the violence offered to him; or if a man had personal property under his care and was dragged away under circumstances which rendered it impossible for him to take it with him and so it was lost. He (the plaintiff) had only himself to blame that the glasses were left behind him in the carriage: and the loss therefore was not the necessary consequence of the defendants' acts, but only due to the plaintiff's own negligence or carelessness: and that this head of damages was too remote for the plaintiff to recover.

The courts do not like the idea of mulcting railway companies in heavy damages for the sins of commission of their servants and conductors. Where a verdict of £50 was given against the Great Western Railway, because their conductor put the plaintiff off the train, though the inconvenience to him was trifling and the conductor had acted *bona fide* under an impression that the plaintiff had not paid his fare, and without using harshness or violence, a new trial was granted on the ground of excessive damages, and the Chief Justice stigmatised the verdict as "outrageous." But there the jurors of our Lady the Queen and my lord differed, and so on the second trial they gave the plaintiff £45 and against that the defendants did not attempt to move: *Huntsman* v. *Great Western R. W.*, 20 U. C. Q. B. 24. And in *Davis* against the same defendants (20 U. C. Q. B. 27,) the Court spoke regretfully of the exorbitant amount of damages (£50) in a case where the defendants were not otherwise concerned than through the act of their conductor, and where the conductor only did what he thought his duty required of him.

But after a second verdict the Court will not grant a new trial, even although it considers the damages excessive. This was held in *Curtis* v. *Grand Trunk R.*

W., 12 U. C. C. P. 90. The plaintiff while travelling between St. Mary's and London mislaid his ticket, and being called upon to produce it could not do so, although in his eager search therefor he pulled out of his pockets, papers, letters, newspapers, and wool, to the great edification and delight of his fellow travellers: the conductor, after waiting some time, stopped the train and turned him off, though while being put off he offered to pay his fare. Damages to the extent of $300 were given against the company, whom the Court held were responsible for the acts of their officers duly authorized and styled under the Act "Conductors," when not committed in excess of his authority, which in this case had not been overstepped; and the Court also declined to disturb the verdict, it being the second one obtained by the plaintiff.

The plaintiff, a passenger on the defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendant's porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The porter had no express authority to remove any person being in a wrong carriage, but he was directed to do all in his power to promote the comforts of the passengers and the interests of the company; it was held that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible: *Bayley* v. *Manchester, Sheffield & C. R. W.*, L.R. 7 C.P. 415.

Sometimes where one is expelled from a train in a summary manner he will have to shew something more than the mere fact that he was the holder of a ticket, before he can recover damages for his expulsion. For instance, where it appeared that the ticket offered by the plaintiff to the conductor must have been sold about sixteen months before and that on that account the conductor refused to take it, it also being proved that on a previous occasion the same plaintiff had presented an old ticket and on its being rejected had paid his fare; it was held that the circumstances being calculated to excite suspicion, it should have been left to the jury to say whether the plaintiff had obtained the ticket fairly, having paid his fare, or whether he was not intending to impose on the conductor: *Davis* v. *Great Western R. W.*, 20 U. C. Q. B. 27.

Even a friend's vouching that one is a true man will not protect one, for in *Curtis* v. *Grand Trunk R. W.*, *ante*, Draper, C. J., remarked that he supposed that a man who produced no ticket, but asserted that he had paid his fare and had lost his ticket and, therefore, declined to pay it again, would—though a bystander corroborated his assertion—be deemed refusing to pay within the meaning of the Act. The fact that one has not fully made up his mind how far he intends to ride, is no excuse for non-payment: *Fulton* v. *Grand Trunk R. W.*, 17 U.C.Q.B. 433. Where at the last moment a passenger tendered to the conductor a twenty-dollar gold piece, and told him to take the fare ($1.35) out of it, but the conductor ejected him, the court sustained the action of the conductor; saying that an officer at a ticket-office might reasonably object to an offer of a $20 gold piece to pay a fare of $1.35, on account of the trouble and risk involved; and that a person rushing into the cars without a ticket has no reason to expect that he will find the conductor prepared to change a $20 gold piece, for he relies upon receiving tickets from the passengers, or, if money be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances: *Fulton* v. *G. T. R.* (*ante*).

A person who declines to pay his fare may be put off near any dwelling-house

which the conductor, in his discretion, may think best. In this case the night was dark and cloudy, but from the place where the ejected man was left the lights of the last station were clearly visible, so the Court considered that the defendants' servants had not exceeded their authority: *(Ibid.)*.

Although a company may, as a general rule, make and enforce proper regulations on all passengers using their railway, still they cannot do so against a party who, in good faith and in ignorance of their regulations, has made a contract with one of the company's duly authorized agents; in which contract there has been no notice of, or reference to, the existence of some such regulation, which would have modified the terms or conditions of the contract: *Childs* v. *Great Western R. W.*, 6. U. C. C. P. 291.

It appears that one may pay his fare to one place, and yet may leave the cars at any intermediate place where the train stops, although the fare to the latter place may be greater than it is to the former: *The Queen* v. *Frere*, 4 E. & B. 598, and *Moore* v. *Metropolitan R. W.*, 8 Q. B. 36.

The rule has been laid down that a passenger, who purchases a ticket for a distant station and gets off temporarily, and without notice, invitation or objection while it is stopping at an intermediate station, does no illegal act; but for the time, he surrenders his place and rights as a passenger on the train, before it starts; and the officers of the railway are bound to give reasonable notice of the starting of the train: *State* v. *Grand Trunk R. R. Co.*, 4 Am. Rep. 258, 58 Me. 176.

In case of fighting or disorder in the cars, the conductor must do all he can to quell it. If necessary, he should stop the train, call to his aid the engineer, fireman, all the brakesmen and willing passengers, lead the way himself—like some valiant Knight of old—and expel the offenders, or else demonstrate by an earnest experiment that the undertaking is impossible: *Pittsburgh, Fort Wayne & C. R. W.* v. *Hinds*, 7 Am. Reg. 14.

SELECTIONS.

THE SUPREME COURT OF JUDICATURE BILL.

On the motion for the second reading of this Bill, Lord Hatherley expressed his entire concurrence in its essential provisions from beginning to end, and his great satisfaction at seeing such a measure in the very able hands of the Lord Chancellor. He believed no one would deny that the time had arrived to take decided steps with respect to the entire system of judicature, divided, as it now was, between the separate tribunals of common law and equity, and by the present Bill the opportunity was afforded of having a cause decided without suitors being bandied from one court to another. In forming the "divisions" of the court care should be taken hereafter to prevent any division being composed of persons of one sort of legal training, so that there should be gradually infused throughout the whole body of judges a feeling in favour of joint administration. It was important that the first part of the Bill should be tried without delay, but the appellate part of the measure was open to more discussion. It was desirable in the interests of the suitors that a single Appellate Court should be formed, sitting during the whole of the judicial year, and giving satisfaction by its uniform results. —Lord Chelmsford regarded the Bill as a great and comprehensive scheme, calculated to effect a vast improvement in our judicature. He did not see, however, that there could be complete fusion of equitable and common law jurisdictions so long as by the formation of "divisions" the old courts would be revived under a new name. He thought the judges should be interchangeable between the "divisions," and should have a joint jurisdiction. With regard to the appellate jurisdiction of the House of Lords, he had long been of opinion that on account of its precarious character, it would be impossible to retain it if a better tribunal could be established, and the tribunal proposed by the Bill was, in his opinion, infinitely preferable, though he regretted that the appeals from Scotland and Ireland were to be excluded from the new Appellate Court, for it was desirable that one great and permanent Court of Appeal should be es-

tablished.—Lord Romilly considered the Bill was the first which effectually grappled with the evils which had to be remedied, and he would, therefore, give his cordial vote in its favour. He, nevertheless, did not concur in that part of the measure which retained the jurisdiction of the House of Lords in appeals from Scotland and Ireland, nor did he approve the proposition that there should be no appeal from the new court to the House of Lords, for in cases of peculiar difficulty it was sometimes desirable to have a second appeal, and the second appeal, if it should be allowed, ought to be made to the House of Lords, which had the advantage of being composed of a mixture of legal men and laymen.—Lord Salisbury hoped the Lord Chancellor would scrutinize most carefully those parts of the Bill whose object was to fuse together the Courts of Law and Equity, for he feared that the Bill as at present framed would divide them by as broad a line of demarcation as at present. With regard to the jurisdiction of the House of Lords, he was compelled to confess that it appeared to him impossible that things could remain as at present, but he thought the proposed new Court of Appeal would benefit as well as the Legislature if the members of the Appeal Court were made peers, with the right to sit and vote in Parliament. He regretted the exclusion of any appeals, and especially of ecclesiastical appeals from the new court.—The Lord Chancellor expressed his satisfaction at the manner in which the Bill had been received. He acknowledged that valuable suggestions had been thrown out, and they would receive due consideration; but it must be borne in mind that in a process of transition it was necessary to move by practicable steps, and avoid passing from one system to another with a violence which would prevent success. He showed, by reference to various clauses of the Bill, that the statement that the provisions of the Bill would give to the several divisions of the court separate and distinct jurisdictions was incorrect. With regard to the appellate court, it had been suggested that ecclesiastical appeals should be subject to its jurisdiction, and, if their Lordships concurred in the proposals, he should have no objection to its adoption. His reason for retaining the jurisdiction of the House of Lords in the case of Scotch and Irish appeals was, because there might be serious constitutional objections to the transference of those appeals to an English Court created by Act of Parliament. If the new court of appeal should recommend itself to the Scotch and Irish people, a further development of the measure might be looked forward to in course of time.—*Law Times.*

JURIES.

Mr. J. W. Erle, associate in the Court of Common Pleas, has sent to the *Times* some observations on the Juries Bill; and, as our readers are aware, no man is more capable of dealing with the subject. The points discussed by Mr. Erle are the number of jurors and the question of unanimity. We are pleased to observe that there is a substantial agreement between the views of Mr. Erle and the views we lately set forth.

Mr. Erle argues for the reduction of the number of jurors from twelve to eight, mainly on the score of convenience. He shows by reference to the early history of juries, that there were reasons for the larger number that no longer exist. The functions of a juror were different to what they now are. He was not exclusively or principally the judge of the facts, but he was a witness on the trial, and each juror "was advisedly selected and summoned as having a personal knowledge of the facts in dispute." Under such circumstances, it was desirable to have as many jurors as could conveniently be brought together; but now, when the juror is not a witness, but only a judge of the fact, it is desirable to have as few jurors as will insure an acceptable verdict. Will not the opinion of eight or seven men upon evidence that has been reviewed by counsel and reviewed by the judge, be satisfactory?

But Mr. Erle does not advocate a reduction in the number of jurors because he objects to twelve, or because he has any special liking for eight. If we had an abundant supply of jurors, we apprehend that Mr. Erle would not ask for a change. It happens, however, that the supply of jurors is inadequate to the demand, and the duty has become a serious tax upon the time of merchants, shopkeepers, and other busy men. So great

is the pressure, that something will have to be done, and we see no other remedy than a reduction in the number of jurors. It has been suggested that, in certain cases, trial by jury should be dispensed with and the facts as well as the law left to the Court. Such a change would not be popular, and as we have trial by jury issues of fact ought to be decided by juries. The Attorney-General proposes that the number of twelve shall be retained in trials for treason, treason-felony, and murder, because he is unwilling to remove any of the existing protections for the life of an accused person. The suggestion is rather unfavourable to the proposal for a reduction of the number of jurors in any case. If twelve are likely to be more just than eight in a trial of life and death, why should they not be so in a trial, the issue of which will set the prisoner free or send him to penal servitude? And if twelve are likely to be more just than eight in the Criminal Court, why not in the Civil Court? Still there is a distinction in the public mind. There is a prejudice in favour of a man being tried by twelve of his peers, and perhaps it would be better to retain the number of twelve in all criminal cases and to reduce it in all civil cases. Such an arrangement would not offend the public sentiment, and it would give great relief to the demands on the jury list.

Mr. Erle proposes eight as the number of jurors. We should prefer seven, because it is an odd number, and it is a matter of experience that an even number of men are not so likely to agree as an odd number. Besides we have tried the odd number in the County Courts, and there it works very fairly.

We lately remarked that we strongly objected to a reduction of the number of jurors and at the same time the abolition of the rule of unanimity. But we further agree with Mr. Erle in his vindication of the rule of unanimity. Mr. Erle ably, and as we think conclusively, answers the chief objection to unanimity. It is said that if the verdict of the majority was taken, jurors would not have to be discharged and the costs of both litigants wasted. He tells us that the number of instances in which juries disagree is not more than 1½ per cent. of the whole number of trials. Probably it will be contended that there would be more instances of disagreement except that the minority gave way to the majority rather than render the trial abortive. But we must not assume that the minority give way in spite of strong conviction. What happens to the jury happens sometimes to the full Court. A judge who takes a somewhat different view of the law from the rest of the Court, does not feel justified in holding to his opinion against the views of the rest of the bench. Besides, those who dissent from the rule of unanimity can hardly do so on the ground that it practically involves the return of the verdict of the majority. Mr. Erle justly remarks that sometimes—when the evidence is conflicting and evenly balanced, or when the slight legal lapse of the defendant is more than compensated by the moral wrong of the plaintiff—the discharge of the jury is the only just conclusion. There is another consideration not mentioned by Mr. Erle. It is that the majority system would probably subject the jurors to personal obloquy. In trials which were associated with political or social questions, if a minority held the popular view, the names of the majority would soon be known, and they would be likely to suffer for their conscientious discharge of an onerous duty. On the whole, we see no valid reason for abolishing the rule of unanimity whilst there are very cogent reasons for its retention.

With regard to mixed juries, we are unable to offer any decided opinion. We agree with the Attorney General that the mixed jury system would be a return to the original practice, and that it is an innovation to have a jury entirely composed of common jurymen. But the historical argument is not conclusive, for, like other institutions, trial by jury must be modified by the changes of society. Our doubt about the mixed jury system is with respect to the working. It would not be desirable for the common jurors to submit their judgment to the special jurors, and we do not think that is probable. But is it not possible that the common jurors might resent the advice of the specials as dictatorial, and oppose it without a due regard to the evidence? At all events the substitution of mixed juries for the present common juries would be an experiment, and in such matters we do not approve of exper-

imental changes, unless the existing system renders a change imperative.—*Law Journal.*

LAWYERS IN PARLIAMENT.

The great influence which the Legal Profession possesses in the Legislature may be best gathered from a statement as to the creation of law peers within the last 250 years, the number of law Lords having at present seats in the House of Peers, and the constituencies which members of the Profession (chiefly barristers) represent in the House of Commons. The law lords at present sitting in the House of Peers are ten (with their ages); Lord St. Leonards, 92; Lord Westbury, 73; Lord Chelmsford, 79; Lord Cairns, 54; Lord Hatherley, 72 (ex-Lord Chancellors); Lord Selborne (present Chancellor), 61; Lord O'Hagan, 71; Lord Colonsay, 80; Lord Romilly, 72; and Lord Penzance, 57. Their united ages are 711 years, the average being 71 years, 1 month and 6 days. In the year 1860 the aggregate years of life of the whole 450 Peers of Parliament were 25,403, the average being 61 years, 7 months and 20 days.

In the House of Commons, as nearly as can be ascertained, there are forty lawyers (chiefly barristers) representing various constituencies.

The roll of Lord Chancellors of Great Britain (including two Irish Lord Chancellors), having Peerages, since the union of England and Scotland in 1603, includes the following distinguished persons: — Lords Ellesmere, Lyttleton, Bacon, Ley, Coventry, St. John, Portland, Clarendon, Shaftesbury, Nottingham, Guildford, Jeffreys, Somers, Raymond, Macclesfield, Cowper, Harcourt, King, Talbot, Hardwick, Henley, Camden, Lord C. Yorke (he only survived his appointment three days, his patent of nobility being made out, but it did not descend to his heirs), Bathurst, Thurlowe, Loughborough, Erskine, Eldon, Plunket, Lyndhurst, Brougham, Cottenham, Truro, St. Leonards, Cranworth, Campbell, Westbury, Chelmsford, Cairns, Hatherley, O'Hagan, and Selborne. Out of the above number of Peers, forty-two, the peerages of thirty-one still remain.

Other Law-Lords (judges and their descendants) have been created in the same period, (1603 to 1873), namely, Lords Cramond, Mansfield, Stowell, Kenyon, Harrowby, Grantley, Rolle, Crewe, Wynford, Gifford, Ellenborough, Abinger, Tenterden, Denman, Kingsdown, Wensleydale, Langdale, Romilly, Penzance, Colonsay.

In the case of Lord Wensleydale, it will be recollected that the first patent granted to his Lordship by Queen Victoria was for a life peerage only; but a Committee of Privileges of the House of Lords decided that such a limited creation was not within the prerogative of the Crown, and therefore a fresh patent for a hereditary barony was issued to Mr. Baron Parke.

Out of the Law-Lords last named (numbering twenty), the peerages of fourteen still remain.

Thus in both Houses of Parliament the Legal Profession is, directly and indirectly, represented by eighty-five persons, namely, forty-five peers and forty commoners.

Appended is the roll of Lords Chief Justices of England (presiding in the Courts of King's and Queen's Bench) since the union of England and Scotland, 1603 to the present day. It includes the following names: Lords Chief Justices Popham, Fleming, Coke, Montague (created Lord Kimbolton and Mandeville 1620), Ley (Lord Speaker 1621, and created a peer, and Lord Treasurer as Lord Ley), Sir Randolph Crewe, 1625, (his grandson was created a peer 1706 as Baron Crewe); Lord Chief Justice Tresilian (he was hanged for laying down law distasteful to the Crown), Lord Chief Justice Hyde, Richardson (died 1635, Lord Cramond, a peer of Scotland), Brampton, Sir J. Rolle (from whom descended Lord Rolle, an English peer), Glyn, Newdegate, Oliver, St. John, (created Lord St. John by Cromwell, to whom he was related, in 1757), Lord President Bradshaw, the chief judge at the trial of King Charles I.; Lord Chief Justice Foster, Sir R. Hyde, Kelynge, Sir M. Hale, Raynsford, Scroggs, Pemberton, the president at the trial of Lord W. Russell; Saunders, Lord Jeffreys, Herbert, Lord Chancellor 1689, created Lord Portland by James II., and died in exile; Lord Chief Justice Wright (became Lord Keeper, and presided at the trial of the seven bishops; he died in Newgate 1689); Lord Chief Justice Holt,

Sir J. Parker, 1710 (became Lord Macclesfield); Sir John Pratt (grandfather of Lord Camden), Lord Raymond, 1718; Lord Chief Justice Lee, Ryder (father of Lord Harrowby), Lord Chief Justices Willes and Wilmot; Lord Mansfield, Lord Kenyon, Lord Wynford, Lord Ellenborough, Lord Tenterden, Lord Denman, Lord Campbell, and Sir Alexander Cockburn, the present Lord Chief Justice.

The members of the Judicial Bench and the Bar of the United Kingdom, through their great learning and independence, may be said to be the guardians of the rights and privileges of persons of every rank in the state. Hence, the law to be found in the statute book and the reports of the cases of Equity and Common Law Courts, comprises a system of jurisprudence more elaborate and extensive than that of any other country; nor can its completeness be appreciated until, when disputes and differences arise, the machinery for adjudicating on the rights of parties is required to be put in motion. *Law Times.*

Among the most striking careers of the time has been that of Judah P. Benjamin, who long represented Louisiana in the United States Senate, subsequently became the leading member of the Confederate Cabinet, and after the close of the war, removed his residence to London. He procured naturalization in England, and upon complying with the requisite conditions, began practice as a barrister. His progress has been so rapid that, although he has only been at the English bar five or six years, he has received the honor of "Queen's Counsel," and assumed the traditional "silk gown," thus taking his place among the upper grade of barristers. It is now intimated in some of the English papers that Mr. Benjamin is among the foremost in the line of those who are likely to be raised to the Bench within the next few years. It would be curious to see an ex-United States Senator, and an ex-Confederate Secretary of State, sitting beside Sir A. Cockburn on the Queen's Bench, with patched wig and ermined gown. Mr. Benjamin is a man of brilliant ability as an advocate, and was surpassed by very few as an orator when he sat in our national councils; his speech on retiring from the Senate, just before the war, was one of thrilling eloquence, not soon to be forgotten by those who heard it.—*Pitts. Law Ad.*

Those gentlemen who are familiarly known as the great unpaid, have, in the ordinary course of things, abundant opportunities of straining their jurisdiction and sinning in various ways which suggest censure. Experience has taught that these offences must be dealt with lightly, so long as they do not work flagrant injustice. It is to a particularly small matter that we now direct the attention of our readers—small in itself, but indicating very clearly what we must be prepared for. At the last Quarter Sessions for Essex, a quick-witted magistrate announced that he had found out that all the editions of Burn's Justice of the Peace in use by the clerks to the petty sessional divisions were dated 1845, and he brought forward a motion, "That the last edition of Burn's Justice of the Peace be supplied to each petty sessional divisoin of thecounty." The estimated cost was £96. The motion having been made, a Mr. Johnston rose and delivered himself of the following observations: "I am entirely opposed to this outrageous proposition, and I think after the late decision of the court it will not be seriously pressed. (Laughter.) What is the good of these musty law books? Let us decide the cases that come before us by the law of nature—(loud laughter)—and not give any attention to what quaint and stupid old people have written down in a long work which is to cost six guineas a volume. (Renewed laughter.) Another objection which I have is that no notice whatever has been given of the amount which will be required, and if they had known the amount that was proposed to be expended I am sure a number of magistrates from all parts of the county would have come down to oppose this resolution." How the learned editors of the last valuable edition of Burns will like to be called "quaint and stupid old people," we do not stop to inquire, but if Mr. Johnston is in the habit of deciding cases according to the law of nature, it occurs to us to suggest whether the Lord Chancellor might not deem it advisable to relieve him of the responsible

duty of administering laws which in many respects are exceedingly artificial. The condition of a magistrate's mind, when he desires to decide according to the law of nature, and a clerk is urging him to consider an obsolete law in a Burn's of 1845, is something terrible to contemplate.—*Law Times.*

Oxford and Cambridge Universities, for some reason or other, appear to have lost what was once almost a monopoly of judicial appointments. If we examine the recent promotions it will be found that several of the new judges are not university men at all, whilst one of the most distinguished is a member of London University. The new Baron was educated at St. Paul's School. Mr. Justice Archibald is not a graduate of any University. Sir James Hannen was educated abroad. There are now only two university men among the judges of the Queen's Bench—the Chief Justice (Cambridge), and Mr. Justice Blackburn (Cambridge); Mr. Justice Quain graduated at London. The learned judge who has just resigned, Sir William Channell, was not educated at a university; neither was Baron Bramwell, nor the Chief Baron, nor Baron Pigott; whilst Baron Martin graduated at Dublin. Consequently Baron Cleasby, who graduated at Cambridge, is the only representative of the old universities in the Court of Exchequer. The Common Pleas has a majority of university men on the Bench, but one hails from Dublin. The Chief Justice and Mr. Justice Byles were privately educated. Mr. Justice Keating graduated at Dublin, and Justices Brett and Denman are both Cambridge men. Mr. Justice Grove, of this Court, is the only Oxford man on the Common Law Bench.—*Law Times.*

Perhaps the most remarkable instance that we can adduce of the genius, learning and marvellous power of Dr. Lushington is the judgment in the Banda and Kirwee Booty. This was a case of booty of war referred to the Admiralty Court under the provisions of the 3 & 4 Vict., c. 65, s. 22. It will be remembered that it had hitherto been the custom to distribute the booty of war—*id est*, of booty taken by land forces—without reference to any Court, and therefore Dr. Lushington was called upon to adjudicate without the guidance of direct precedents, and indeed without any precedents that were authoritatively binding on the Court. The case was exceptionally important and complicated. The value of the booty was estimated at 70,672,000 rupees. The point in dispute was whether the co-operating forces had a right to a share of the booty, or whether it was the sole property of the forces directly concerned in the capture. The case began on January 8, 1866, and after twenty-six days hearing, the arguments of counsel were brought to a close on February 28. Fifteen parties were represented by thirty-six counsel. On June 30 Dr. Lushington delivered his judgment. This judgment occupies no less than sixty-three closely-printed pages in the *Law Journal Reports* (New Series), vol. 35. The main principle that the judge enunciates is that only the forces directly concerned in the capture are entitled to a share in the booty. The opening remarks upon the jurisdiction of the Court are concise, lucid, and conclusive, and the rest of the judgment would delight a soldier as well as a civilian, and a layman as well as a lawyer. Dr. Lushington surveys the whole plan of the campaign, and no point, however comparatively minute, is neglected if it has any bearing on the issue. At the end of the judgment the learned judge said, "I cannot bring this judgment to a close without observing that I view with regret the disappointment it must occasion to many gallant claimants who have performed so many noble services during this mutiny." Dr. Lushington was through life distinguished for gentlemanly demeanour and winning courtesy. Such a judgment as that in the Banda and Kirwee Booty case would have made and firmly established the reputation of any man. If that alone remained it would entitle Dr. Lushington to rank as one of the greatest jurists who ever sat on the judicial bench. But when we consider that when Dr. Lushington delivered this judgment he was in his eighty-sixth year, we are amazed as well as delighted that a judge at such an advanced age could have done that which would have taxed the powers of any judge in the day of his physical and mental prime.—*Law Journal.*

THE REPORTERS AND TEXT WRITERS.

(*From the American Law Review.*)

Adolphus and Ellis's Reports. "Distinguished for superior care and accuracy."—J. Pitt Taylor, in The London Law Magazine, vol. xxvii. p. 321.

Amos and Ferard on Fixtures. "A very excellent treatise."—Lord Tenterden, C. J., in Lyde *v.* Russell, 1 B. & Adol. 395.

Arnould on Marine Insurance. "An excellent treatise."—Chief Justice Shaw, in Wilson *v.* General Mutual Insurance Co., 12 Cush. 365. "It was said in the argument," continued the Chief Justice, "that the authorities cited do not warrant the conclusion stated in the text, because they were not the case of a part owner and master, in a case charging barratry. We are inclined to think that this is correct; the passages, therefore, can only be regarded as an application of the principle to this particular case, by writers who have devoted much learning and time to the investigation of principles, and who have stated these as their results."

Atherley (Edmond Gibson). A practical Treatise on the Law of Marriage and other Family Settlements. 8vo. London, 1818. "An able and excellent treatise."—Chancellor Kent, in Reade *v.* Livingston, 3 Johns. Ch. 491.

Benjamin on Sales. "A work from which I have derived great advantage, and which is remarkable for the acumen and accuracy of the writer, who possesses not only a knowledge of English law but of jurisprudence in general."—Willes, J., in Seymour *v.* The London and Provincial Marine Ins. Co., 41 L. J. N. S. C. P. 198.

Blackstone's (Sir William) Commentaries. "Where, if anywhere, we may look to find the principles of our jurisprudence. If he has fallen into some minute mistakes in matters of detail, I believe, upon a great question like this, as to the constitution of marriage, there is no authority to be more relied upon. He began, before the Marriage Act, to read the Lectures at Oxford, which became the Commentaries, but did not publish them till after, and his attention must have been particularly directed to the law of marriage."—Lord Campbell, in The Queen *v.* Millis, 10 Clark & Finnelly, 767.

Blackstone's (Sir William) Reports. "It appears, by the preface to the first volume of his reports, that that learned judge did not give his notes the last correction he had intended, and they were not published until after his death; yet, we are well assured that there is nothing contained in any of the opinions of the judges, or judgments of the court, that did not fall from the bench. He certainly took most accurate notes; and although the words attributed by him to Lord Mansfield, in giving judgment in Cooper *v.* Chitty, are not to be found in the report of that case in Burrow, yet there is little, if any, doubt but that his Lordship used them."—Best, C. J., in Price *v.* Helyar, 1 Moore & Payne, 553.

Bulstrode's Reports. According to Mr. Serjeant Woolrych, "one of the best old 'Reports' of legal cases."—Lives of Eminent Serjeants, vol. i. p. 380.

Burrow's Reports. "I may say, as Lord Mansfield himself said of Sir William Blackstone, Sir James Burrow's Reports are not always accurate."—Lord Campbell, C. J., in The Queen *v.* Newton, as reported in the 24 L. J. N. S. Q. B. 248. As reported in 4 Ellis & Blackburn, 871: "I may say, as Lord Mansfield himself said when speaking of Sir W. Blackstone, that what is reported is not always accurate." In Jones *v.* Roe, 3 T. R. 96, Mr. Justice Buller observed: "It has been openly acknowledged by Lord Mansfield, and I have had repeated opportunities of hearing it from him in private, that he has given to Sir J. Burrow his own note and opinion of a case, which he could not deliver publicly in court; for it was not at that time the practice of this court [the King's Bench] to give their opinions here in cases which came from the Court of Chancery." And again, the same great authority said that Burrow "certainly had the highest assistance in stating what he calls the probable grounds of the judgment."—Goodtitle *v.* Otway, 1 B. & P. 586. "Sir James Burrow was not in the habit of taking short-hand notes in court, and he professes to give rather the substance than the exact words of what was spoken by the Chief Justice; but Lord Mansfield, it is well known, looked over and corrected the greater part of his proofs before they were published, so that if this work does not contain all he actually said, it at least conveys his arguments as nearly as possible in his own language. The eloquent passages from the judgment in Wilkes's case bear evident marks of having been carefully revised by the orator himself; and there are several others that carry with them the same stamp of authenticity."—London Law Magazine vol. v. p. 100.

Campbell on Negligence. "A very good book."—Willes, J., in Oppenheim *v.* The White Lion Hotel Co., 40 L. J. N. S. C. P. 232. "I would also refer to some ingenious remarks as to

the misapplication of the term 'gross negligence,' which are to be found in Campbell's Law of Negligence, p. 11."—Ibid.

Coke's Fourth Institute. "With respect to what is said relative to the admiralty jurisdiction in 4 Inst. 135, I think that that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."—Buller, J., in Smart *v.* Wolff, 3 T. R. 348.

Coke's Institutes. Camden's Britannia. Lord Hardwicke, C. J., said that though Coke's Institutes were good authorities as to matters of law, yet that they were no legal evidence of the historical facts mentioned in them; and that the same has been held as to Camden's Britannia, and such like books.—Rex *v.* Reffit, Cunningham, 62, 3d ed.

Comberbach's Reports. "Comberbach, in giving the judgment of the court, which is the only sensible part of his whole report (for it is plain to me that he did not understand the former argument on the former day, which is the first part of his report of the case), agrees with Shower. But he must be mistaken in the first part of this report."—Lord Mansfield, in Cooper *v.* Chitty, 1 Burr. 36.

Comyns's Digest. "A book of very excellent authority."—Lord Ellenborough, C. J., in Kingdon *v.* Nottle, 1 M. & S. 363. "Admirable."—Vaughan, B., in Chapple *v.* Durston, 1 Cromp. & J. 9. "A work almost perfect in its kind," says Judge Story. "He is the most fortunate jurist who possesses the earliest edition. Of the later editions, in octavo, we can say little by way of commendation. They have the gross fault of a total departure from the style, brevity, accuracy, and simplicity of Comyns; a departure which is utterly without apology, as it exhibits, on the part of the editor, either an incapacity for the task or an indifference to the manner of executing it. Mr. Kyd's edition has the negative merit of having done but little injury; Mr. Rose's, in 1800, has interwoven a miserable patchwork; and Mr. Hammond's, in 1824, has even less merit, containing the substance of his indexes to the common-law and chancery reports, thrown together with a strange neglect of the symmetry of the original work."—Story's Miscellaneous Writings, 389-393, ed. 1852.

Carpmael's Patent Cases. In the course of the argument in Feather *v.* The Queen, 6 Best & Smith, 270, 271, the case of Walker *v.* Congreve, 1 Carpmael, 356, was cited. Cockburn, C. J., remarked: "Mr. Carpmael's ability is great, but that is not a professional report."

Cox's Cases in Chancery. "Cox has the reputation of being a reporter of brevity, perspicuity, and undoubted fidelity. That which, says Lord Eldon, makes Mr. Cox's work of so much value in the library of a lawyer, is his habit of examining the registrar's book for the purpose of greater accuracy.—Alrich *v.* Cooper, 8 Ves. 392.

Doctrina Placitandi. "A book which has always been admitted to be of great authority in pleading, and was often quoted by Lord C. J. Willes."—Lawrence, J., in Lee *v.* Clarke, 2 East, 340. "A work which, though extremely learned and elaborate, and for a long time justly considered as the capital source of information upon pleading, amounts, after all, to no more than an extensive collection of adjudged points, classed without any skill of arrangement, under titles in alphabetical series."—Stephen, Pl. preface to the first edition.

Dyer's Reports. "The cases inserted in the margin of Dyer are of great authority, being collected by Lord Chief Justice Treby."—1 Wms. Saund. 59, 6th ed.; 1 Wms. Notes to Saund. 82, Grose, J., in Troward *v.* Cailland, 6 T. R. 442.

Fitzgibbon's Reports. Lord Hardwicke, citing a case from this book, said, "The case is well reported, though the book is not one of authority."—Flanders *v.* Clark, 1 Ves. Sen. 10, quoted in Burbank *v.* Whitney, 24 Pick. 155.

Gray on Costs. "Very high authority."—Byles, J., in Republic of Peru *v.* Weguelin, L. R. 7 C. P. 355.

Hargrave (Mr.). "One of the most learned of our text writers . . . The research and erudition of a lawyer so eminent."—Lord Denman, C. J., in The Queen *v.* The Chapter of Exeter, 12 Ad. & El. 531.

Jarman on Wills. "I certainly admit Mr. Jarman to be authority."—Cockburn, C. J., in Brookman *v.* Smith, L. R. 7 Exch. 274.

Johnson's Reports. In 1820, Mr. Justice Story wrote: "Mr. Johnson is a gentleman, as we have the pleasure to know, of great literary accomplishments, well instructed in the law, and of most comprehensive research. His Reports are distinguished by the most scrupulous accuracy, good sense, and good taste. He gives the arguments of counsel with force, precision, and fluency; transfusing the spirit rather than the letter of their remarks into his pages. One is never puzzled by unintelligible sentences, impertinent sallies, or disproportionate reasoning in his volumes. There is an exactness and symmetry about them that satisfies the judgment. His notes, too, are all good; so good

that we wish we had a great many more of them. He leaves little causes to take care of themselves, and assigns them a brief space. But when he comes to great arguments, where research and talent are brought out with vast power and authority, he pours their whole strength before the reader, giving him all the materials of an independent judgment. He can, if he pleases, repeat such cases for himself, by the aid of the reporter."—Story's Miscellaneous Writings, 177.

Johnson's Chancery Reports. "The chancery decisions of Chancellor Kent are as full of learning, and painstaking research, and vivid discrimination, as those of any man that ever sat on the English woolsack. No lawyer can ever express a better wish for his country's jurisprudence, than that it may possess such a Chancellor and such a Reporter."—Story's Miscellaneous Writings, 178, 179.

March's Reports. "A very indifferent reporter."—Parker, C. J., in Mitchell *v.* Reynolds, 10 Mod. 138. "March is mean, but yet not to be rejected," says Roger North, in his Discourse on the Study of the Laws, p. 24.

Palmer's Reports. Chief Justice Parker, in reviewing a case which is reported in Palmer and in Rolle's Reports, but which Rolle never transcribed into his Abridgment, remarked that Rolle, "being at that time the experter reporter, has given the fullest account, and is chiefly to be regarded."—Lord Kildare *v.* Fisher, 1 Strange, 71.

Park on Insurance. "A very able treatise."—Shaw, C. J., in Loomis *v.* Eagle Life and Health Ins. Co., 6 Gray, 399.

Parke (Baron). In a very recent case, Mr. Justice Willes observed, with reference to a question of pleading, that Baron Parke "was the highest authority on that subject within living memory."—Huddart *v.* Rigby, 10 Best & Smith, 918.

Phillips on Insurance. "The clear and satisfactory statement of the result of the authorities, by Mr. Phillips."—Thomas, J., in Marble *v.* City of Worcester, 4 Gray, 411.

Pothier (Robert Joseph). Treatise on the Law of Obligations, or Contracts. Translated from the French, with an introduction, appendix, and notes, illustrative of the English Law on the subject. By W. D. Evans. 2 vols. 8vo. London, 1806. "In a work, which the author used to say was more used by other writers than noticed, I mean a treatise upon the law of evidence appended to his edition of Pothier, by the late Sir W. D. Evans," &c.—Williams, J., in Doe *v.* Suckermore, 5 Ad. & El. 722. "A most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law-merchant in particular."—Lord Ellenborough, C. J., in Hoare *v.* Cazenove, 16 East, 398.

Rastell's Entries. In delivering the considered judgment in the King *v.* Wildey, 1 M. & S. 188, Lord Ellenborough said: "The precedent in Rastell is one of the most vicious precedents that I ever contemplated. . . . . I had a curiosity to know on what authority the precedents in Rastell were founded; and, upon looking at his preface, I find the author is anxious to discharge himself from all responsibility respecting that part of his work. He says, 'Understand this, good reader, that none of the declarations, pleadings, entries, and precedents that be in Latin in this book be of my making or compiling.' He then points at the sources from whence they were derived, viz., four books: first, the old entries; the second, a book of precedents by Mr. Edward Stubbis; the third, precedents by John Lucas; the fourth, a book of precedents, which, he says, 'was my grandfather's, Sir John Moore, some time one of the justices of the King's Bench, but not of his collection.' The only merit which he takes to himself, which is undoubtedly not an inconsiderable one, is in the arrangement of them and the index; but he expressly discharges himself from every other responsibility, assigning as a reason for so doing, in the concluding part of his preface, that he had been absent from the kingdom, 'and lacking conference with learned men.' This may be considered as a sufficient excuse for many errors; and, among others, for the insertion of that vicious precedent, on the sole authority of which we are desired to overturn the numerous authorities laid down by Lord Coke and Lord Hale, two of the most eminent authors and judges that have ever adorned Westminster Hall."

Rolle's Abridgment. It was said at the bar that it was the opinion of Rolle that a certain case was not law. Mr. Justice Twisden observed: "That was his opinion, it may be, when he was a student. You have in that work of his a commonplace which you stand too much upon: I value him where he reports judgments and resolutions; but otherwise it is nothing but a collection of Year Books, and little things noted when he made his commonplace book. His private opinion must not warrant or control us here."—Osborne *v.* Walleeden, 1 Mod. 273. "Lord Rolle was a very learned man, and his Abridgment was published by Lord Hale, perhaps the greatest man of the law that ever was."—Lord Holt in The City of London *v.* Wood, 12 Mod. 689.

The Reporters and Text Writers.

Roper on Husband and Wife. "An obscure book."—Lord Campbell, Lives of the Chancellors, vol. viii. p. 141. See Bishop on Married Women, vol. i. §§ 7, 10.

Savile's Reports. An accomplished legal bibliographer says that "this book seems to be pretty much in the condition of Pope's 'most women,' and to have 'no character at all.'"—The Reporters, 142.

Sellon's Practice. "An extremely useful book of practice, both of K. B. and C. P., which the practiser will find of great service."—1 Wms. Saund. 318 *b*, 6th ed. ; I Wms. Notes to Saund. 531.

Sheppard's Abridgment. "This Abridgment being cited at the Rolls, 11 Nov. 1762, with some apology for the book, Sir T. Clarke, M. R., said that it was one of the best the Abridgments ; but he said that the author had been thought a great plagiary, and, in particular, that many parts of this Abridgment were taken from the notes of Sir W. Jones."—MS. note in edition in Lincoln's Inn Library, printed in the London Law Magazine, vol. i. p. 578, note. "Sheppard's Abridgment, printed in 1675, though not disreputable in its execution, scarcely struggled into existence against the superior work of Lord Chief Justice Rolle, which was published under the auspices of Sir Matthew Hale, in 1668."—Story, Miscellaneous Writings, 385.

Siderfin's Reports. "Siderfin does not seem to know what the court was going upon."—Lord Mansfield, in Cooper *v.* Chitty, 1 Burr. 35.

Starkie on Evidence. "A text writer, to whose opinions I shall always pay the greatest respect, Mr. Starkie, I mean, has given this mode of proof the sanction of his authority, as preferable on principle to our own."—Coleridge, J., in Doe *v.* Suckermore, 5 Ad. & El. 706. "A learned and valuable work."—Williams, J., ibid., at p. 722. "A work of great merit."—Patterson, J., ibid., at p. 734.

State Trials. Emlyn's Preface to the Second Edition. "Mr. Emlyn, whose learning and ability are vouched by Mr. Hargrave in his preface to the second edition of the State Trials, expresses an opinion," &c.—Keating, J., in Mordaunt *v.* Mordaunt, L. R. 2 P. & D. 120.

Sugden on Powers. "A book of the highest authority." "The authority of Lord St. Leonards, the highest, perhaps, of the present day with regard to the law of real property."—Cockburn, C. J., in Wright *v.* Wilkin, 2 Best & Smith, 251, 242.

Sugden on Vendors and Purchasers.—In 1809 Lord Eldon remarked that this book "seems to me to be a book of considerable merit."—Mackreth *v.* Symmons, 15 Ves. 354.

Story on Contracts. In a very recent case, the Lord Chief Justice of the Court of Queen's Bench speaks of *Mr. Justice Story's* work on contracts.—Smith *v.* Hughes, 40 L. J. N. S. Q. B. 225.

Swinburne on Wills. See Law Books, New Editions of.

Termes de la Ley. "A very excellent book."—Lord Kenyon, C. J., in Doe *v.* Meakin, 1 East, 459. "A work of high reputation."—Metcalf, J., in Commonwealth *v.* Gallagher, 16 Gray, 241. "That is a book of great antiquity and accuracy, as is observed by Bayley, J., in 5 B. & C. 229."—Putnam, J., in Penniman *v.* French, 17 Pick. 405.

Text Writers. "When we find an opinion in a text writer upon any particular point, we must consider it not merely as the private opinion of the author, but as the supposed result of the authorities to which he refers."—Lord Alvanley, C. J., in Touteng *v.* Hubbard, 3 B. & P. 301.

Vernon's Reports.—In Hardley *v.* Clarke, reported in the *Times* newspapers for May 28 or 29, 1799, Lord Kenyon laments the inaccuracy of Vernon's Reports, although he concluded by saying that Vernon "was the ablest man in his profession."

Viner's Abridgment. "Mr. Justice Foster. 'Brother Viner is not an authority. Cite the cases that Viner quotes : that you may do.'"—Far *v.* Denn, 1 Burr. 364. "Viner's Abridgment is not of much value as a book of Reports." Lord Chanceltor Sugden, in Reilly *v.* Fitzgerald, Drury temp. Sugden, 150.

Webster's Dictionary. "Webster is very impartial."—Erle, C. J., in Earl of Lisburne *v.* Davies, L. R. 1 C. P. 264. In a recent case, Mr. Justice Byles observed : "I was much struck with the quotation from Webster's Dictionary, where one of the definitions given o 'tenant' is, 'one who has the occupation or temporary possession of lands or tenements whose title is in another.'" The quotation is from Cowley :—

> "O fields, O woods. oh, when shall I be made
> The happy *tenant* of your shade ?"

—Birks *v.* Allison, 9 Jur. N. S. 694, 695 ; 13 C. B. N. S. 12, 23.

West's Symbolrography. In Ludlow *v.* Drummond, 2 Taunt. 85, Mansfield, C.J., observed that this book "had always been esteemed a book of authority." The writer has had occasion to examine many of the precedents of indictment, and has found them to be faulty.

Wheaton's Reports. "Valuable reports, adorned with much of his own exact learning."—Story, Miscellaneous Writings, 155, 156.

Winch's Reports. "It is rather extraordinary that Lord Hobart has not recorded that case in his excellent volume of Reports. The cases in Winch are in general well reported; but in the preface to Bedloe and Dalison's Reports it seems as if those were not really the reports of Sir H. Winch; for it is there said, 'The book called Winch's Reports, but improperly enough ascribed to that learned judge.' And, indeed, it appears that several of the cases in that book were decided after Sir H. Winch's death."—Lord Kenyon, C. J., in Troward *v.* Cailland, 6 T. R. 441.

Yelverton's Reports. "Are among the best of the old authorities."—*Per Curiam*, in Osborne *v.* Moss. 7 Johns. 164. The American edition, enriched with the learned annotations of Mr. Justice Metcalf, has been universally commended.

Wynne's Eunomus. "A work of great merit and reputation."—Shaw, C. J., in Commonwealth *v.* Anthes, 5 Gray, 212.

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

CHANCERY CHAMBERS.

Reported by T. Langton, Esq., M. A., *Barrister-at-Law.*

Davidson v. Boyes.

Married woman — Parties to a foreclosure suit — Separate answer.

[Strong, V. C., on appeal from the Referee, 13th Jan., 1873.]

Semble that a married woman is not in respect of dower, a necessary or proper party to a bill for the foreclosure of a mortgage in which she has joined to bar dower.

On an application, however, for a married woman so made a party to answer separately, an order will be granted, but the plaintiff will take it at the risk of having the costs of making her a party afterwards disallowed.

Elliott v. Queen City Assurance Co.

Statutes—Con: Stat. Can. c. 79, § 4—Subpœna to another Province—Words "suit pending."

[Spragge, C., 27th Jan., 1873.]

Upon a submission to arbitration being made an order of Court, a suit is pending within the meaning of Con. Stat. Can. c. 79, § 4, so as to enable the Superior Courts of Law and Equity to issue process to compel the attendance of witnesses resident out of their jurisdiction.

Waterous v. Farran.

Applications in the nature of appeals—Irregular filing—Jurisdiction of the Referee—34 Vict. Ont. c. 10, § 2—Amending Bill.

[Spragge, C., on appeal from the Referee, 27th Jan., 1873].

When a Deputy Registrar or other officer whose duty it is to file papers, receives and files a paper duly presented to him for that purpose, he does a ministerial act and leaves the regularity of the proceeding on the part of the person presenting the paper to be objected to by any who may have an interest in objecting.

An application to the Referee impeaching the propriety of the filing is not an appeal or in the nature of an appeal from the Deputy Registrar or other officer so as to oust the jurisdiction of the Referee under 34 Vict. c. 10, § 2.

Semble after the expiry of the time limited by an order to amend the right of the plaintiff to amend under such order is strictly gone, but the defendant's right to object to amendments made after the period limited may be waived.

See *Lyle* v. *Elwood*, 54 L. T. (N. S.) p. 59.

Moffatt v. Prentice.

Statutes—Con. Stat. Can. c. 79, § 4—Subpœna to another Province—Witnesses.

[Spragge, C., on appeal from the Referee, 27th Jan., 1873.]

A plaintiff obtained *ex parte* an order under Con. Stat. Can. c. 79, § 4, for the issue of a subpœna to the Province of Quebec, requiring certain defendants to attend before the master at Cornwall for examination upon their answers. An application made to discharge this order on the ground that § 4, applied only to witnesses, and not to parties to the suit, was dismissed, and it was *held* that, looking to the object of the Act and the propriety of its application to the examination of parties, the term witness in this section should be used in its widest sense, and should include parties to the cause as well as witnesses in the ordinary sense of the word.

Bull v. Harper.

Compensation—Effect of Conveyance or vesting order—Misdescription in advertisement.

[The Referee, 28th January, 1873.]

A purchaser by taking a conveyance or vesting order waives all objections to the title. He also

takes the responsibility of obtaining possession upon himself, and if evicted by a title to which his covenants do not extend he has no right to compensation on that account.

Misdescription in the advertisement, where it amounts to a material representation, is a ground for compensation even after conveyance.

Re Lauder & Mulock.

Solicitors—Deceased Solicitor a partner of two firms—Liability of surviving members of one firm to account to surviving members of another firm of which the deceased partner had also been a member.

[Strong, V. C., on appeal from the Referee, 3rd Feb., 1873].

The Referee has no power to exercise summary jurisdiction over Solicitors; such jurisdiction can only be exercised on an application to the Court.

Semble. When one member of a firm of Solicitors has died, the summary jurisdiction of the Court can no longer be exercised over the survivors, because such an application may necessitate a taking of the partnership accounts and the representatives of the deceased partner would then be necessary parties.

Campbell v. Royal Canadian Bank.

Appeal bond—Regularity of.

[The Referee, 7th Feb., 1873.]

A party opposing the allowance of a surety's bond for security for the costs of an appeal, may read affidavits in opposition to the surety affidavit of justification.

An appeal bond is properly entitled in the cause in the Court below.

Hayes v. Shier.

Filing—Service of notice of filing—Gen. Ord. 43—Irregularity.

[The Referee, 13th Feb., 1873].

A paper mailed to or delivered to a Deputy Registrar or like officer, elsewhere than at his office, to be filed cannot be treated as a filing; but if the Deputy Registrar or other officer has notwithstanding afterwards filed the paper in his office, previous irregularities in its delivery to him are generally speaking cured.

When a pleading is filed in a Deputy Registrar's office in a County in which the Solicitor for the opposite party does not reside, service of notice of filing must be effected according to Order 43. Service on the Toronto Agent is irregular.

Notice of filing not having been served on the same day that the pleading was filed is not a ground for moving to take the pleading off the files. The proper course is to move to enlarge the time for taking the next step in the cause.

Buell v. Fisher.

Immediate sale—Chambers.

[The Referee, 14th Feb., 1873.]

An order for an immediate sale after the master has fixed a day for payment, and before it has arrived, will not be made in Chambers.

Grant v. Winchester.

Security for costs—Cross-examination on affidavits—Uncertain abode.

[The Referee, 17th Feb., 1873.]

The rule in force in England (Dan. Pr. 810), that a party who has made an affidavit must submit to cross-examination upon it, if required upon notice to his Solicitor, before taking any further steps in the cause, being founded on an English order has no application in this Province.

On an application for security for costs, a certificate of the state of the cause is only necessary when the application is made before answer filed.

A plaintiff out of the jurisdiction with no certain place of abode, and having no property in this Province, though stating on affidavit that she was only temporarily absent and intended to return, was ordered to give security for costs there being no circumstances from which the Court could reasonably infer that the intention to return would certainly be carried out.

The order was subsequently discharged upon the plaintiff returning to the Province.

Noad v. Noad.

Changing venue—Cause of action—Balance of convenience.

[Blake, V. C., 14th March 1873].

The locality of the cause of action is not regarded in Chancery as a ground for changing the venue.

When the venue has once been laid a very large preponderance of convenience must be shewn to change it, and in investigating this regard will be paid to the ability of witnesses to travel, and to the probability of a postponement of the hearing being the result of a change.

Between private individuals it is impossible to say that one class of witnesses will be more injured than another by absence from home. Between a private individual and a public officer this may be considered.

McKay v. Harper.

Fee Fund—Costs of guardian ad litem when paid out of the Fee Fund.

[Spragge, C., on appeal from Referee, 10th March, 1873].

A Solicitor upon the plaintiff's application having been appointed guardian *ad litem* to infant defendants, and being unable to obtain his costs from the plaintiff or from the infants' estate, it was ordered that they be paid out of the suitor's fee fund.

McGillivray v. McConkey.

Amendments.

[Blake, V. C., on appeal from the Referee, 31st March, 1873.]

If a plaintiff amends his bill by *striking out* portions so as to render the answer to them useless, an application may be made by the defendant answering for the costs thus unnecessarily incurred, and such an application should be made at the hearing.

After answer liberal *addition* to the bill by amendment, retaining the original allegations is proper even though rendering a new defence necessary, and the costs of such amendment are proper costs in the suit.

Redman v. Brownscombe.

Irregularity—Endorsement—Gen. Ord. 40.

[The Referee, April 2nd, 1873].

The endorsement of the name and place of business of the Solicitor conducting proceedings is by Gen. Ord. 40 required on the first writ *sued out* or proceeding *filed* in a suit or matter, but is not essential on the first papers *served*.

Swetnam v. Swetnam.

Purchaser—Registry of mortgage for balance of purchase money—Vesting order.

[The Referee, 3rd April, 1873.

A purchaser who to secure a balance of purchase money has given a mortgage to the Court, must have his mortgage registered, and pay the fees for registration before a vesting order will be granted.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Bradstreet & Son v. Everson, Preston & Co.

1. *Held*, That the facts in evidence were sufficient to go to the jury upon the question whether the receipt, by which the defendants undertook to collect the claims mentioned in it, was authorized or given by them.

2. The defendants, a "mercantile agency" at Pittsburgh, gave their receipt for a claim "for collection" against a party in Memphis, and transmitted the same to their own attorney, who collected the money and failed to pay it over. *Held*, That they were liable for his neglect.

Error to the Court of Common Pleas of Allegheny county.

Opinion of the court by Agnew, J. Delivered November 14, 1872.

There are but two questions in this cause which are required to be noticed. First, whether J. M. Bradstreet & Son authorized the receipt of June 2nd, 1865, by which they undertook to collect the claims mentioned in it, and second, the nature of their liability. It is undisputed that J. M. Bradstreet and Son had a branch office in Pittsburgh, of what they termed their "Improved Mercantile Agency," and that the persons employed in this office were their agents. They only deny that their business was a collecting agency; asserting that it was confined to giving to subscribers information of the mercantile standing of men in business in the different parts of the country. It is in testimony that the acceptances mentioned in the receipts were delivered, as the witness states, to J. M. Bradstreet and Son at the office of the agency, and the receipt given for them, is in the name of J. M. Bradstreet and Son, and was made out by a person in the office, acting in their business. This was in 1865. In 1867 the plaintiffs were called on by a person belonging to the office for a power of attorney to be sent to their agent or attorney in Memphis, Tennessee, to enable them to collect the moneys for the acceptances from John W. Wood, the attorney to whom the acceptances had been sent by them, and who having collected the money had failed to pay it over to the defendants. This power directed to J. B. Woodward, of Memphis, and dated August 30th, 1867, was handed to the person in charge of the Pittsburgh office, who gave for it a receipt of the same date in the name of the defendants, stating that the power was executed by the plaintiffs at the request of the defendants, and addressed to *their* agent J. B. Woodward. Woodward himself testifies that he was called on in Memphis by J. De Soto, the agent of J. M. Bradstreet and Son in that city, and at his request and in his company went to John W. Wood and demanded of him the money he had collected on the acceptances. He also testifies that his correspondence was with J. M. Bradstreet and Son, and not with the plaintiffs, and that he was engaged to attend to the business by J. De Soto the agent of the defendants at Mem-

phis. There are some minor matters not necessary to be detailed. These facts were clearly suffieicnt to go to the jury upon the question whether the receipt was given by the defendants, and we see no error in the court below in refusing to take the case from the jury.

The next question is upon the nature of the liability arising upon the receipt. It is in the following words: "J. M. Bradstreet and Son, Improved Mercantile Agency. Pittsburgh, June 2, 1865. Received of Messrs. Everson, Preston & Co., four duplicate acceptances for collection, versus Watt C. Bradford, Memphis, Tennessee, amounting in all to $1,726.37." (signed) "J. M. Bradstreet and Son."

It is argued, notwithstanding the express receipt "for collection" that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of *Bullitt* v. *Baird*, decided at Philadelphia in 1870; the only case in this State upon the subject of such agencies. There the receipt read "for collection according to our direction, and proceeds when received by us, to be paid over to King and Baird." Across the face of the receipt was printed these words "N. B. the owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war." The limitation of the liability of Bullitt and Fairthorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction.

Recurring to the analogy of attorneys at law the first point to be considered is the interpretation given by the courts to the terms of a receipt "for collection." In our own State we have several decisions in point. In *Riddle* v. *Hoffman's* Ex'r., 3 Penn. Rep. 224, Riddle, an attorney in Franklin county, gave a receipt in these words "lodged in my hands a judgment bill granted by Henry H. Morwitz to Henry Hoffman for the sum of $1200, due with interest since the 15th of May, 1811, which is entered up in Bedford county, which I am to have recovered if it can be accomplished." Riddle sent this bill to his brother, a practicing lawyer in Bedford. The money was made by the sheriff. but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent and the money was thus lost. Hoffman sued the Franklin county Riddle on his receipt and recovered. On a writ of error it was contended that the words of the receipt "which I am to have recovered if it can be accomplished," imported only a limited undertaking to have it collected by another and not to collect it himself. But this court held that the receipt contained an express and positive undertaking for the collection of the money, if practicable, and not merely for the employment of another to that end; and that defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill and attention.

The next case is *Cox* v. *Livingston*, 2 W. & S. 103. This was the receipt:—"Received of Mr. Thos. Cox, of Lancaster, Pa., *for collection*, a note drawn in his favor, by Mr. Dubb, calling for $497.65 payable three months after date." The note was left with an instruction to bring suit. The receipt was dated August 30, 1837, and Livingston died in January following without having brought suit. Dubb became insolvent. It was held that Livingston was liable for the collection, though only two terms intervened between the receipt and his death.

Krause v. *Dorrance*, 10 Barr 462, was assumpsit against two attorneys for money collected and not paid by another attorney to whom they sent the note for collection. The liability of the original attorneys for the collection was admitted, but the point was made and succeeded that a demand before suit was necessary. Rogers, J., says expressly they were liable for

the acts of the agent whom they employed, but being without fault themselves a demand was necessary before a resort to an action.

In *Rhines* v. *Evans*, 16th P. F. Smith, 192, the receipt was, "Received for collection of A. Rhines one note on Luckens & Beeson, of Rochester, dated October 30, 1857, for $365." The liability of Evans, the attorney, was conceded, and the question was on the statute of limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt.

These cases show the understanding of the Bench and Bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt when he knows he must employ another to make the collection. *Bullitt* v. *Baird supra.*

We find cases in other states holding the same doctrine. In *Lewis & Wallace* v. *Peck & Clark* 10 Alabama Rep. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes for collection, and after collecting the money transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having however endorsed the notes. Held that Peck and Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewis and Wallace the original attorneys. This is a direct recognition of the liability of the collecting attorney to the transmitting attorney. The case of *Pollard* v. *Rowland* 2 Blackburn (Ind.) Rep. p. 22 is more directly in point. Rowland received from Pollard claims for collection and sent them to Stephen an attorney in another county. Stephen obtained judgment and collected the money. Held that Rowland was accountable to Pollard for the acts of Stephen to the same extent that Stephen was, and could make no defence that Stephen could not; and that Rowland was liable to Pollard for the money. *Cummins* v. *McLean et al* 2 Pike (Ark) Rep. 402 was a case nearly similar to the Pennsylvania case of *Krause* v. *Dorrance, supra.* The attorney sent the claim to another attorney at a distance and was held liable, but for the omission of the plaintiff to make a demand, he failed to recover. The court say the attorney is liable for the acts of the attorney he employs. In a Mississippi case two attorneys Wilkison and Willison received of plaintiff a claim for collection, and brought suit and obtained judgment. They dissolved partnership, Wilkison retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkison as surviving partner of Willison, he was held liable for the receipt of the money by Jennings: *Wilkison* v. *Griswold* 12 Smedes & Mor. Rep. 669.

In view of these reasons and authorities we hold that a collecting agency, such as the defendants have been found to be, receiving and remitting a claim to their own attorney, who collects the money and fails to pay it over, is liable for his neglect.

Judgment affirmed.

—*Pittsburgh Law Journal.*

REVIEWS.

American Law Review—January 1873. Little, Brown & Co., Boston, U. S.

This able Review discusses at length the Geneva Arbitration and its results. The writer thinks that his country will in the end, lose more than it has gained by the Rules of International Law laid down.

"The 'due diligence' which we have gained will some time require of us a police system and methods of repression which will be tantamount to martial law. Nothing was ever done in the public history of the country so opposed to our plainest and best interests. The United States has been and must be a neutral nation. It had been, up to 1861, the acknowledged champion of neutral rights. Its wise, far-sighted, and equitable statesmanship had uniformly pursued the one consistent policy. It is simply amazing, it is nothing but madness, that the authorities of the present day should turn their backs upon all this bright history, and eagerly bind fetters upon the future activities of their country."

The other articles are, The Rights of Assignment and underlease—The need of a Criminal Code—&c. The digest of English Reports we again take advantage of. The Summary of Events is as usual very interesting, and the Reviews of Law Books complete, impartial and searching. We strongly advise those who can find five dollars to spare to subscribe for the *American Law Review.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 35th Victoria.

DURING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

Robert Heber Bowes.
Allan John Lloyd.
James R. Roaf.
John George Killmaster.
Isaac Baldwin McQuesten.

And the following Gentlemen received Certificates of fitness :

R. McMillan Fleming.
J. Bruce Smith.
J. George Killmaster.
James R. Roaf.
Allan J. Lloyd.
Isaac B. McQuesten.
Peter Cameron.
Rupert E. Kingsford.
Alexander Sampson.
Wickstead.

And on Tuesday, the 4th February, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

James Joseph Wadsworth, M. A.
Alexander Haggart, B. A.
Samuel Clarke Biggs, B. A.
Elliott Travers, B. A.
Julius Lefebvre, B. A.

Junior Class.

Charles H. Connor.
Thomas G. Meredith.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding. —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR JUNE.

1. SUN... *Whit Sunday.* Hon. J. S. Macdonald died, 1872.
2. Mon... Fenian skirmish at Limeridge, 1866. P.D., Q.B. N.T.D., C.P.
3. Tues... Last day for notice of trial Co. Ct. N.T.D., P.B. P.D., C.P.
4. Wed... Open Day, Q.B. New Trial Day, C.P.
5. Thurs.. Open Day, Q.B. Open Day, C.P.
6. Fri.... New Trial Day, Q.B. Open Day, C.P.
7. Sat.... Ea. Tm. ends. Last day for Ar. Cks. and Stu. to give not. for prim. exam. and call to Bar. Open Day.
8. SUN... *Trinity Sunday.*
9. Mon.... Charles Dickens died, 1870.
10. Tues... Gen. Sessions and Co. Court Sittings in each Co. begin.
14. Sat.... Last day for Courts of Rev. finally to revise Assess. Rolls.
15. SUN... 1st *Sunday after Trinity.* Magna Charta signed, 1215.
20. Fri.... Accession of Queen Victoria, 1837. 37th Vict. begins.
21. Sat.... Longest day.
22. SUN.... 2nd *Sunday after Trinity.*
23. Mon... Hudson Bay Co.'s Territory transferred to Canada, 1870.
25. Wed... Lord Dufferin landed at Quebec, 1872.
29. SUN... 3rd *Sunday after Trinity.*

CONTENTS.

EDITORIALS:

Judgment of Mr. Dalton in *Dain* v. *Gossage*.... 165
Death of Charles Purton Cooper 165
Registrar and Record and Writ Clerk 165
Landlord and Tenant 166
Mr. Justice Ludlow 166
Judgment of the Judicial Committee of Privy Council in *The Town of Dundas* v. *The Hamilton and Milton Road Co'y* 166
Law Society 166
The Wills Act, 1873 167
Travelling by Rail 170
Criticisms on the Reporters 157
Appointment of Queen's Counsel 178
Contempt of Court 182

SELECTIONS:

The Law of Clubs 183
Forensic Eloquence 184

CANADA REPORTS:

Ontario:

Notes of Recent Decisions:

Court of Common Pleas 188
Common Law Chambers 191
Chancery Chambers 191

Common Law Chambers:

Dain v. Gossage—
Administration of Justice Act, secs. 59, 64—Construction of Statute—"Expressio unius, &c." 193

LAW SOCIETY OF UPPER CANADA 196

THE

Canada Law Journal.

Toronto, June, 1873.

We call attention to the judgment of Mr. Dalton, on page 193 in a case of *Dain* v. *Gossage*. The point decided, that no County Court should be held in the County of York in May of this year, is not of very general interest, but the judgment is well worthy of careful perusal as a masterly and logical analysis of apparently conflicting clauses in a statute. The opinion of Mr. Dalton has been confirmed by the two Chiefs.

We notice the death of a well-known legal author who created no small stir in his own day. Charles Purton Cooper died last month at Boulogne, in his eightieth year. His works number nearly forty volumes of the most diversified character. He was an earnest advocate of law reform, and, by his letters on the Court of Chancery, did much to forward the amendment of many abuses in that Court. In this country, he is best known by his reports (*Cooper, C. P.*, "Chancery Reports, with Notes and Appendix,) and his edition of Lord Brougham's decisions, which has, however, failed to supersede the regular reports of Milne and Keen.

We note that it is proposed in England to let the offices of Registrar and of Record and Writ Clerk follow that of the Master into oblivion. It is proposed that a judge's secretary shall discharge all the essential parts of the duties of these functionaries. Decrees and orders will then be no longer entered of record, but will be drawn up by the solicitors, settled by counsel, and signed by the secretary. The filing of pleadings, affidavits, and the like will then be dispensed with, and all

purposes will be answered by the service of copies upon the opposite party. It is extremely probable that Ontario will in due course follow the example of England in all measures which tend to simplify and assimilate the practice of law and equity.

In *Erskine* v. *Deans*, the Master of the Rolls recently laid down a doctrine which will be somewhat startling to persons who own and rent farming land. The question arose upon the application of a tenant of a farm to recover compensation from the executors of his deceased landlord, for the loss of sheep alleged to be poisoned through browsing on yew trees growing on the demised premises. The Court held that the claimant was entitled to succeed, on the broad ground that as between landlord and tenant there is an implied warranty on the part of the former that the trees and shrubs which he plants or suffers to be on the land demised shall not be noxious or injurious to the tenant. One can hardly believe that this decision will be sustained, if appealed from.

We have before advertised the merits of Mr. Justice Ludlow, who graces the Pennsylvania Bench, as an admirable specimen of a "highfalutin" Judge. His Honour has been lately indulging in some judicial grandiloquence upon the English Marriage Law of George II. c. 13, relating to the marriages of Papists and Protestants. We are not seeking to defend this law, but it well becomes any Judge of the Republic where the law of divorce legalizes adultery to talk fustian after this fashion:

"If this nation, in the strength of its manhood, is to be respected; if it has achieved the right to speak and to be heard, its policy upon this subject ought to be marked and understood: and it surely will entitle itself to the grateful consideration of the civilized world, if it emphatically declares that upon the subject of marriage, and especially its destruction, it will determine every case by its own enlightened principles of morals and of public policy, and upon the policy of universal toleration."

An old friend has courteously handed us a copy of the judgment of the Judicial Committee of the Privy Council, in the case *The Town of Dundas* v. *The Hamilton and Milton Road Coy.*, delivered recently by Sir Barnes Peacock, Sir Montague Smith and Sir Robert P. Collier. Their Lordships concurred in the conclusions arrived at by the Court of Appeal, in several places quoting with approbation the language of the learned Chief Justice of that Court. The case in appeal is reported in 18 Grant 311. At p. 325, Chief Justice Draper says; "It, (the argument of the Road Company who built the obnoxious bridge), amounts to this—that, to abate a nuisance of omission in a place where it injures them, they may erect a nuisance in another place where it injures the party guilty of the first nuisance." Their Lordships thought he might have added "and where it injures the public who are not guilty of the nuisance intended to be abated", This point however, though not referred to in this place was not overlooked by the Chief Justice, for he says, on the next page, "I presume it will not be seriously contended that a fixed bridge which would prevent masted vessels, sloops, schooners &c., from navigating this canal would not be indictable as a nuisance."

LAW SOCIETY.

Easter Term, 1873.

The examinations for Call to the Bar resulted as follows:

Out of a maximum of 600 marks, Mr. Geo. A. Mackenzie obtained 451, and passed without an oral examination. The following were passed after an oral:

Mr. W. McDiarmid	obtained	410	marks.
" Vincent	"	389	"
" C. R. W. Biggar	"	388	"
" J. Reeve	"	387	"
" S. Kirkpatrick	"	356	"
" Carman	"	339	"
" Brennan	"	336	"
" H. Matheson	"	326	"
" S. Platt	"	300	"
" C. V. Warmoll	"	300	"
" A. H. Spragge	"	300	"
" Caddy	"	300	"

Mr. Henry J. Morgan, of the Quebec Bar, was also called to the Bar of Ontario.

The following gentlemen passed their examination as Attorneys, and received certificates of fitness:

Mr. C. R. W. Biggar who obtained 467 marks.
" T. McArthur " 455 "

out of a maximum of 600, were admitted without oral examination.

Mr. H. Matheson	obtained	419	marks.
" Dunbar	"	413	"
" G. A. Mackenzie	"	409	"
" Brennan	"	383	"
" S. Kirkpatrick	"	378	"
" D. G. Macdonell	"	356	"
" R. H. Dennistoun	"	353	"
" McMillan	"	347	"
" Bogart	"	334	"

The latter were admitted after an oral examination.

THE WILLS ACT, 1873.

[COMMUNICATED.]

Of the many Acts which engaged the attention of the Ontario Legislature during the past session, there are but few of more importance than "the Wills Act, 1873." The nature and extent of the changes effected by this statute can only be perfectly understood by comparing the present law, on those points in which alterations have been effected, with the provisions of the new Act.

By the Statute 32, Geo. 3, c. 1, (see Con. Stat. U. C., cap. 9, s. 1.), it was enacted, that in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England, as they stood on the fifteenth day of October, 1792, as the rule for the decision of the same. The effect of this statute as connected with our present subject, was to make the law of England on the subject of wills (as it stood at the date mentioned in the Act) the law of this Province.

By the Imperial Act of 1 Vict., c. 26, from which our new Act has been mainly taken, many important changes were effected in the English law regarding the execution and revocation of wills and the testamentary power; but though the old law was in many respects strongly condemned by the real property commissioners, on whose report the English statute was chiefly based, and though the reasons for this condemnation were undoubtedly applicable to this Province, it was not until the year 1868 (by 32 Vict., c. 8,) that any of the provisions of the English Act were adopted by our Legislature. It was no doubt considered that the statute, 4 Wm. 4, c. 1, ss. 49-51, (Con. Stat. U. C., c. 82, ss. 11-13) sufficiently cured the most obvious defects of the old law, so far at least as wills affecting real estate were concerned, and, in regard to wills of personal estate, the impression which it is well known has generally prevailed outside of the profession, that such wills required signature and attestation, and could not be made by any person under 21 years of age, has, to a great extent, secured in actual practice a compliance with the requisites now prescribed by statutory enactment.

The construction put by the Court of Chancery, in the case of *Whately* v. *Whately*, 14 Grant, 430, on the 49th section of 4 Wm. 4, c. 1, (Con. Stat. U. C., c. 82, s. 11,) called attention, in a marked manner, to the defects of that Act as compared with the provisions of the English statute; and the subsequent case of *Longhead* v. *Knott*, 15 Grant, 34, served as a reminder that one of the most

indefensible doctrines of the English law, the doctrine of the revocation of a devise by a subsequent conveyance which created no substantial change in the interest of the devisor, was in force in this Province to the full extent to which it had been carried by the English decisions. The hope expressed by the learned judge who decided that case, "that the anomaly which compels this decision may soon be removed by the Legislature," was realized by the passing of the statute, 32 Vict., c. 8, by which the provisions of the English Act regarding the revocation of wills and the time at which they should be construed to speak and take effect, (as if executed immediately before death of the testator,) were made part of our law.

The provisions of the new statute are by the 2nd section limited to wills *made* after 31st December, 1873, unless otherwise expressly provided in the Act. All wills made before that date will therefore be governed by the present law. The same section provides, however, that every will re-executed or re-published, (whatever that may mean), or revived by any codicil, shall, for the purposes of the Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived.

The fourth section is devoted to the interpretation of the terms "will," "real estate," "personal estate," "person," "testator," and "mortgage." This interpretation clause requires careful consideration. Associated with the other provisions of the Act, it effects some important changes in the law in so indirect a manner that they might escape the notice of a casual reader. Thus the inclusion in the term "will" of "a disposition by will or testament, or a devise of the custody and tuition of any child made under the provisions of the Act of Charles the Second regarding wards, liveries, and tenures," taken in connection with the sixth section disenabling an infant to make a will, has the effect of abolishing the power which infants now possess, under the statute of Charles, of appointing guardians to their children; and the inclusion in the words "person" and "testator" of "a married woman," taken in connection with the words of the enabling clause of the Act (section 5), has the important effect of completely emancipating married women from the testamentary disability to which they have been hitherto subjected.

The provisions of the enabling clause of the statute do not materially extend the present power of testamentary disposition.

The power of devising real estate acquired after the making of the testator's will has existed in this Province for nearly forty years. It did not exist in England when the statute 32; Geo. 3, c. 1, was passed. The old doctrine was that a devise operated as a conveyance or appointment by will, and that therefore a man could not devise lands of which he was not seized at the time he made his will. "It resulted from this state of the law that whenever a man acquired real estate which he wished to dispose of by will it was necessary that he should make a fresh will, if he had made one before, and so from time to time as often as he acquired real estate, or it would go to his heirs" (per Spragge, V. C., in *Whately* v. *Whately*, 14 Grant, 433.)

To remedy this inconvenience, it was provided by the 49th section of 4 Wm. 4, c. 1, (Con. Stat. U. C., c. 82, s. 11,) that "When the will of any person who shall die after the sixth day of March, 1834, contains a devise in any form of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been, or may be acquired by the devisor after the making of such will in the same manner as if the title thereto

had been acquired before the making thereof. The effect of this Act was to remove the disability to devise after acquired real estate which had theretofore existed, a step in the direction of improvement which was of the highest importance, and which our Legislature took some years in advance of the Imperial Parliament.

Contingent, executory, and future interests in any real or personal estate, and rights of entry for conditions broken and other rights of entry, are comprised in the enumeration of interests of which a testator is enabled to dispose by the fifth section of the new Act.

The statute contains but one disenabling clause. Section 6 provides that "No will, made by any person under the age of twenty-one years, shall be valid." This section abolishes the power which infants have hitherto possessed to dispose by will of their personal estate. The statute, 32, H. 8, c. 1, enabled all persons, including, of course, infants and married women, to dispose by will of their real estate, but by the explanatory act, 34-35, H. 8, c. 5, the power thus unguardedly conferred upon infants was expressly abridged, and it has never since been restored. The ecclesiastical courts, however, in dealing with testaments of personal property, adopted the rules of the civil law, and permitted a male infant of the age of fourteen and a female of the age of twelve to make a will of personalty. Such is in fact still the law of this Province.

A comparison of our new statute with the English Act, 1 Vict., c. 26, will show that the Legislature has omitted from the new statute the clause disqualifying married women which is contained in the English Act.

Married women were disqualified from devising real estate by the 14th section of the Statute of Wills, (34-35, H. 8, c. 5), and the harsh principles of the common law also disqualified a married woman from bequeathing her personalty except by the license or authority of her husband. The tendency of modern legislation has been to remove the disabilities to which married women have been hitherto subjected, and the law of "*separate estate*," as administered by the Courts of Equity, has to a great extent relieved married women from the disabilities imposed on them by the common law and the old statute of wills. When it is considered that the Courts of Equity have held (see *Taylor* v. *Meade*, 11 Jur., N. S. 166, and *Hall* v. *Waterhouse*, 11 Jur., N. S. 361,) that a married woman may devise the equitable fee in real estate settled on or conveyed to her for her separate use, and that her heir at law may be compelled to convey the legal estate to her devisee, it will be seen that the old statute has to a great extent been repealed by the doctrine of the Court. In speaking of separate estate and of the power of disposing by will of such estate, which the Court has secured to married women, Lord Westbury remarks (*Taylor* v. *Meade*, 11 Jur., N. S. at p. 167) that "the violence thus done by the Courts of Equity to the principles and policy of the common law as to the *status* of the wife during coverture, is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences."

The statute, 22 Vict., c. 34, (Con. Stat. U. C., c. 73,) confers (by sect. 16) on a married woman a limited power of testamentary disposition, enabling her to devise her property to her children, or failing there being any issue, then to her husband, or as she may see fit; but the "Act to extend the rights of property of married women (35 Vict., c. 16), operating in connection with the doctrine of separate estate, may probably be regarded as empowering a married woman to dispose by will absolutely of her equitable interest in all the classes of property which are,

by the Act, made separate property, including her real estate. It is remarkable, however, that the Act contains no provision settling a married woman's general personal property to her separate use.

It will thus appear that the omission from the new statute of the clause contained in the English Act, disenabling married women, is of less importance than would at first appear; but it is still important, inasmuch as a married woman is empowered by the Act to dispose of the legal estate in her lands, a valuable power, but one which the Courts of Equity could not, in view of the express wording of the old statute, venture to give to her; and it is also important, inasmuch as a married woman will acquire by the Act a power of disposing, by will, of her *general personal property* not settled to her separate use.

For the construction of the former Act, see the cases of *Royal Canadian Bank* v. *Mitchell*, 14 Grant, 412; *Chamberlain* v. *McDonald*, 14 Grant, 447; *Wright* v. *Garden*, 28 U. C. Q., B. 609; and the recent case of *Mitchell* v. *Weir*, 19 Grant, 568; also *Davison* v. *Sage*, not yet reported, which is the only direct authority on the construction of sect. 16.

(To be Continued.)

TRAVELLING BY RAIL.

A railway company is liable to an action for false imprisonment, if that imprisonment be committed by its authority; and such authority need not be under seal. But the plaintiff must give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the company to do so. "In the ordinary course of affairs, a company must decide whether they will submit to what they believe to be an imposition, or, for their protection, use the summary power (given to them in many cases) of arresting offenders; and as, from the nature of the case, the decision whether a particular person shall be arrested or not must be made without delay, and as the case may be one of not infrequent occurrence, we think it is a reasonable inference that, in the conduct of their business, the company have on the spot officers with authority, without the delay attending on convening the directors, of deciding whether the servants of the company shall or shall not, on the company's behalf, apprehend a person accused of travelling without paying. We think that the company would have a right to blame those officers if they did not on their behalf apprehend the person, if it seemed a fit case: and if so, the company must be answerable if, in the exercise of their discretion, these officers on their behalf apprehend an innocent person." Blackburn, J.: *Goff* v. *Northern R. W.*, 3. E. & E. 672.

In *Moore* v. *Metropolitan R. W.*, L. R. 8 Q. B. 36,—the latest case on the subject, the plaintiff had a return ticket from M. to N., and getting out at E., a station short of M., refused to pay an extra 2d. demanded: he thereupon was arrested by the inspector of the station, (the company being empowered to arrest persons committing frauds by the non-payment of fare,) and the charge being dismissed by the magistrate, the plaintiff brought an action of trespass and false imprisonment. The Court held that as the inspector was the defendant's representative at E., it must be presumed, in the absence of evidence to the contrary, that he had authority from the defendants to arrest persons supposed to be guilty of defrauding the company, and that the defendants were liable for his mistake. If the plaintiff had committed the offence charged, that would have been a defence on the merits, as the company were liable on the ground that their servant made a mistake. In giving judg-

ment it was stated that *Goff* v. *Great Northern R. W.*, was a well considered case, and the principles there laid down have never been deviated from. Where a railway company are carrying on business there are certain things which are necessary to be done for the carrying on of the business and the protection of the company, and there are things which if done at all must be done at once, and therefore the company must have some person on the spot to do these things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises, what shall be done. *Giles* v. *Taff Vale R. W.*, 2 E. & B. 822, which was followed by *Goff* v. *Great Northern Railway*, laid down the rule that if such person, intending to exercise his authority, makes a mistake and does an act which cannot be justified, the company are responsible, because he is their agent. The latter case also decides that where there is a necessity to have some one on the spot to act on any emergency and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is *prima facie* evidence that he had authority, and the presumption that he had authority must be rebutted by the company. Where one who is clothed with authority to do all that is right and proper in the premises happens to make a mistake, or commits an excess while acting within the scope of his authority, his employers are responsible for it: but where he does an act which the company themselves have no authority to do, the company will not be liable for his acts: *Poulton* v. *London & S. W. R. W.* L. R. 2 Q. B. 534. In this case it was held that the railway company had power to arrest a person travelling without having paid his own fare, but that they could not apprehend him for not having paid for a horse that he had in the train; their authority only extending to detain the horse. And so the plaintiff, who had been arrested, got nothing for his false imprisonment: though had the station-master given him into custody under the erroneous supposition that he had not paid the fare for himself as an individual, that being an act which the company were authorised to do, and had empowered their agent to perform for them, they would have been liable. As Keating, J., remarked in *Edwards* v. *London & N. W. R. W.*, L. R. 5 C. P. 445, the cases decided are cases where a company has made by-laws, and an act of Parliament has given authority to the company's servants to apprehend persons committing offences against the by-laws; and it has been held, that under such circumstances, the servants may be considered to have authority to enforce the by-laws, and to do whatever is necessary for the purpose.

A foreman porter, who in the absence of the station-master is in charge, has no implied authority to give into custody a person whom he suspects is stealing the company's property; and if he arrests an innocent person the company will not be liable: *Edwards* v. *London, &c., ante*. Though it would appear that if an officer, appointed expressly to watch the company's property, took an innocent person into custody on the charge of stealing, it might be said that the company were liable: *Ibid, per* Brett, J.

The clerk at the ticket office of the London and South Western Railroad wished a Mr. Allen to take a French coin (two sous) as change. Mr. A. objected and demanded a British penny; and as the clerk would not take back the sous Mr. A. attempted to put his own hand into the bowl of the till containing coppers, to help himself; for this the clerk gave him into custody on the charge of attempting to rob the till. In an action brought against the company for

false imprisonment, it was held, that as such arrest, after the attempt had ceased, could not be necessary for the protection of the Company's property, but was merely to vindicate justice, the clerk had no implied authority to arrest the man: his authority only extended to the doing of such acts as were necessary for the fulfilment of the duties entrusted to him; and that the company was, therefore, not liable for the act of the clerk, nor for that of the policeman who took A. into custody. Blackburn, J., was inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender: or if the clerk had reason to believe that the money had been actually stolen, and he could get it back, by taking the thief into custody, and he took him into custody with a view of recovering the property taken, it might be that that also could be within the authority of the clerk: *Allen* v. *London & S. W. R. W.* L.R. 6 Q. B. 65. From the above cases the rule, as to the liability of companies for the acts of their servants, may be deduced.

Under section 49 of the Railway Act, 1868, constables may be appointed to act on the line of any railway, who shall have full power to act as such for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts, on such railways and on its works, and in all places not more than one quarter of a mile distant therefrom; and to take before a justice of the peace any person guilty of an offence punishable by summary conviction under the act, or any of the acts and by-laws affecting such railway.

Any person who uses violent and threatening language towards the conductor of a train, and interrupts him in the discharge of his duty, is liable to be apprehended and punished as for a misdemeanor. Where a man who had been apprehended and brought before a magistrate for such misconduct, was discharged by the Justice, and afterwards brought an action against the conductor, it was held that the complaint having been made and prosecuted by the defendant in his character as a railway conductor,—under sanction of an act of parliament,—he was entitled to six months notice of action, and that without such notice no action could be sustained: *Lauzeau* v. *Lemaré*, 20 U.C. Q.B. 481.

As a learned judge remarks, no actions have been more frequent of late years than those against railway companies, in respect of injuries sustained on or through them: a few of these will be noticed now, although *ex necessitate* most will be left unreferred to.

It is the duty of a company to use due and proper care and skill in conveying travellers. The duty thus laid upon them does not arise from any contract made between the company and the persons conveyed by them, but it is one which the law imposes. If railways are bound to carry, they are also bound to carry safely: it is not sufficient for them to bring merely the dead body of their passenger to the end of the journey, and there deliver him up to those entitled to the remains: *Collett* v. *London & N. W. R. W.*, 16 Ad. & Ell. N. S. 984. Every person is a passenger and entitled to be carried safely, (so far as due care will provide for his safety), who is lawfully in the carriage of the carrier: *Great Western of Canada* v. *Brand*, 1 Moore, P.C., N.S. 101.

If one is lawfully on the road and is injured by the negligence of the defendants, he is entitled to recover, notwithstanding that he is a "dead-head," being

a stockholder in the company, travelling by the invitation of the president, and not in the ordinary passenger car: *Philadelphia & Reading R. W.* v. *Derby*, 14 Howard U.S., Rep. 468. So, though the contract for the conveyance of mails has been made with the Postmaster General, still a clerk, who is injured while travelling free in charge of the bags, has a right of action: *Collett* v. *London & N. W. R. W.*, *ante*: see also *Austin* v. *Great Western R. W.*, L.R. 2 Q. B. 442, as to the right of injured parties to recover, even where they have paid no fare. Where the action is founded on breach of duty, and not on contract, it is not necessary to allege in the pleadings, or prove at the trial, that reward was to be paid by the plaintiff: *Marshall* v. *York, Newcastle &c. R. W.*, 11 C. B. 655. And where the Printers' Pension Society hired a train of the defendants, for an excursion from London to Brighton and back, for a certain sum, and the defendants gave tickets to the treasurer of the society, from whom the plaintiff purchased one, and an accident, in which the plaintiff was hurt, having occurred, it was held that the plaintiff was a passenger to be carried by the defendants, for whose safety they were liable: *Skinner* v. *London B. & S. C. R. W.*, 5 Ex. 787.

Where an accident happens to a passenger, either by the carriage breaking down or running off the rails, that is *primâ facie* evidence for the jury of negligence on the part of the company; and such evidence, if not rebutted by evidence given by the defendants, will justify a verdict against the company which the Court will not set aside: *Dawson* v. *Manchester S. & L. Ry.*, 5 L. T. N. S. 682. In this case, the engine ran off the track, and it was found that its fore-axle was broken; but no evidence was given as to whether the accident caused, or was caused by, the breakage. The plaintiff's shoulder was contused, and he had received a blow on his head which crushed in his hat: for a time he was insensible, and for a longer period sick: as a salve, the jury gave him a large sum which the Court allowed him to keep. The doctrine laid down in this case is sustained and enforced by *Skinner* v. *London B. & S. C. Ry.*, 5 Ex. 787, *Carpue* v. *London B. & S. C. Ry.*, 5 Ad. & E. N. S. 747, and *Reid* v. *Great Northern Ry.*, 28 L. J. (Ex.) 3. In the first of these it was decided that it was not necessary for the plaintiff to shew specifically in what the negligence of the defendants consisted, and that if the accident arose from some inevitable fatality it is the duty of the defendants to prove it.

The plaintiff being a passenger in one of the defendants' cars the axle of the tender broke, and the tender and car in which he was were thrown off the track and his arm was broken. At the trial the defendants called the engineer who had been in charge of the train, who proved that he had examined the axle shortly before the accident when it appeared in good order. The jury having found a verdict for the plaintiff upon this evidence, and with a charge favorable to the defendants, the Court refused to set it aside, on the ground that it was for the jury to determine on the evidence, whether or not there was negligence on the part of the company: *Thatch* v. *Great Western R. W.*, 4 U. C. C. P. 563. Chief Justice Macaulay, in delivering judgment, remarked that the accident having happened unaccountably, and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their part, and having failed to do this to the satisfaction of the jury, he could not see sufficient ground for sending the case to a second trial, when the same evidence and no more might again be submitted to another jury.

But where it has been agreed that, in consideration of a free pass, the passenger shall travel at his own risk, such agreement will be held good, and will be taken to exclude all liability on the part of the company for any negligence—even though gross or wilful,—for which they would otherwise have been liable. Of course, it would be different were an action brought for an independent wrong, such as an assault or false imprisonment: nor does such agreement take away any liability that might be incurred as to criminal proceedings: *McCawley* v. *Furness R. W.*, L. R. 8 Q. B. 57.

So long ago as the days of Sir James Mansfield, it was held in *Christie* v. *Griggs*, 2 Camp. 79, that there is a difference between a contract to carry goods and a contract to carry passengers. In the former case the carrier is liable for his freight in every event, but he does not warrant the safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safe conveyance. So if the breaking of a coach is purely accidental, the plaintiff will have no remedy for the misfortune he has encountered. The contract made by a general carrier of passengers is to take due care (including in that term the use of skill and foresight), to carry his living freight safely: and it does not amount to a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, *i.e.*, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence: *Readhead* v. *Midland R. W.*, L. R. 4 Q. B. 379 (Ex. Ch.) also L. R. 2 Q. B. 412, and the cases therein cited. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, "Lex non cogit ad impossibilia," "Nemo tenetur ad impossibilia." "Due care," however, undoubtedly means, (having reference to the nature of the contract to carry,) a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due and proper care, however widely construed, however rigorously enforced, will not, as the plaintiff Readhead sought to do, subject a railway company to the plain injustice of being compelled by law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could have prevented or detected. In this case, the accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in it, which was not attributable to any fault on the part of the manufacturers, nor was it discoverable previously to the breakage. *Grote* v. *Chester & Holyhead R. W.*, 2 Ex. 251, shows that when a competent person is employed to make the tire of a wheel, for instance, and employs proper materials for the work, the company will not be liable for any damage arising from a defect in the tire which it was impossible to detect, and so prevent the accident. In the Court of Appeal of the State of New York, however, it was held that a warranty was annexed to the contract to carry made by railway companies, *Alden* v. *New York Central R. W.*, 12 Smith 102: but the American cases on this

point are far from being uniform: *Ingalls* v. *Bills* 9 Metcalf 15.

Lord Campbell's act, 9 and 10 Vict. c. 93 (of which our act, Con. Stat. Can. ch. 78, is a transcript), has proved a great boon to the relations of persons deprived of their lives by railway accidents, and many have been the actions decided thereunder. It is now definitely settled that a jury in estimating the damage sustained by the wife, husband, parent or child of a person killed by misfeasance, cannot take into consideration mental suffering endured or loss of society, but must give compensation only for the pecuniary loss sustained. If the jury were to enquire into the degrèe of mental anguish which each member of a family suffers from a bereavement, then not only the child without filial piety, but a lunatic child and a child of very tender years, and a posthumous child, on the death of the father may have something for pecuniary loss, but cannot come in *pari passu* with other children, and must be cut off from the solatium. If a jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants: especially would the consequences be disastrous if all the relatives mentioned in the fifth section of the Imperial Act, (the sixth of ours), the father and the mother, grandfather and grandmother, stepfather and stepmother, grandson and granddaughter, stepson and stepdaughter, not only got compensation for pecuniary loss, but a solatium for their shattered affections and broken hearts: *Blake* v. *The Midland R. W. Co.*, 18 Ad. & Ell. N.S. 93. *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 306 (Ex. Ch.,) also, decides that no solatium for grief or the loss of the society of the de ceased can be recovered.

The Scotch law is more generous, for by it a solatium is given for wounded feelings, even where the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit to them, from his bankruptcy or dissipated habits: Ersk. Inst. 592, note 13. It also grants a solatium to a man injured in his happiness and circumstances by the death of his wife and child: whereas in England a widower will not get anything unless the death of his wife causes him some pecuniary loss, (in argument *Gilliard* v. *Lancashire & Yorkshire R. W. Co.*, 12 Law Times 356): it being a pure question of pecuniary compensation, and nothing more, which is contemplated by the act. (See also *Armsworth* v. *South Eastern R. W. Co.*, 11 Jurist 758.)

On one occasion when Byles, J., was leaving the matter to the jury, he said, "If the deceased had a fatal disease which would be sure to kill him, but if his death was precipitated by the collision, the defendants were liable. As to the damages, the plaintiff was only entitled to recover for actual pecuniary loss. If sound, the deceased might have lived some years; if unsound he might have died in a short time, and so the amount of damage would be less: *Birkett* v. *Whitehaven Junction R. W. Co.*, 4 H. & N. 732.

When after a man was injured the defendants paid him, and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he might have against the company; if he subsequently dies from the effects of such injuries no fresh cause of action accrues to his representatives: *Read* v. *Great Eastern R. W. Co.*, L. R. 3 Q.B. 555. But a remark of Erle, C. J., in *Pym* v. *Great Northern R. W. Co.*, 4 B. & S., at page 406, to the effect that the statute gives to the personal representative a cause of action beyond that which the deceased would have had had he survived, and based on a different principle—

and the words of Coleridge, J., in *Blake* v. *The Midland R. W. Co.*, *ante*, that "the statute does not transfer the injured party's right of action to his representative, but gives to the representative a totally new right of action on different principles," would appear to give some color to an opposite doctrine. (See also, *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N. 211 (Ex. Ch.,) and *Dalton* v. *South Eastern R. W. Co.*, 4 C. B., N. B. 296.)

The remedy given by the statutes is to *individuals* and not to a *class;* and therefore on the death of a person whose income arose from lands and personalty, (quite independently of any exertion of his own; and no portion of it was lost to his family by his demise) an action under the act is still maintainable, if in consequence of that death the mode of distribution of his income among the different members of his family is changed to the detriment of some of them. As for instance in this case—the eldest son took the bulk of the property as heir-at-law, leaving but a small settlement for the widow and younger children, who accordingly brought an action and obtained from the jury £1000 for the widow, and £1500 for each of the eight young children; and the court sustained the verdict: *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 397, Ex. Ch. And it was also decided that the loss of the reasonable probability of pecuniary benefit from the continuance of the life of the deceased, was a sufficient damage to maintain the action.

The insurances on a man's life, if they go to the benefit of his family, may reduce the amount recoverable for damages. In an unreported case at *Nisi Prius*—*Hicks* v. *Newport, Abergavenny & H. R. W. Co.*, mentioned in 4 B. & S. 403,—Lord Campbell told the jury to deduct from the amount of damages the amount of an insurance against accidents, and any reasonable sum that they should think fit in respect of the life insurances. This was the only case mentioned to Pollock, C. B., in reply to a question of his as to whether there was any case in which notice had been taken of insurances left by the deceased.

Robinson, C. J., on one occasion, confessed himself utterly at a loss to make a satisfactory computation of the amount of damages to be awarded, or of the pecuniary loss sustained by a widow and her children by the death of the head of the family: he said, he had no means of determining whether they would have been better off if the father's life had run its natural course; it was mere conjecture. He (the father) might have become extravagant or intemperate and squandered his property, or from too great eagerness to grow rich, might have lost it by grasping at too much, or might have died from natural causes within a year or a month, leaving his family no better off than he did leave them when carried off by the sad accident. The Court will not interfere to reduce the damages assessed, unless they are clearly excessive; but where an industrious, well-to-do farmer was killed at the disastrous Desjardins Canal accident in March 1857, the Court held that £3000 was not an exorbitant compensation for the widow and three children: *Secord* v. *Great Western Ry. Co.*, 15 U. C. Q. B. 631.

As to attempts to mitigate the damages in the case of *Ferrie*, another Desjardins Canal victim, in 15 Q. B. at p. 517, McLean, J., said, "if, for instance, the deceased had his life insured, and the plaintiff as his executor had received after his death for such insurances an amount, the interest of which would exceed the annual income of the testator while living and exercising his ordinary avocations, it must surely be competent for the defendants to shew that the wid-

ow can have sustained no pecuniary damage by the death of her husband; and, the action being for the injury arising in a pecuniary point of view, nominal damages only, if any, could in such a case be recovered."

In all actions for injury by negligence, the damage should be a compensation for the actual injury, and it is error to leave the measure and amount of damage, as well as the rules by which they are to be estimated, entirely to the jury. *Pennsylvania R. W. Co.*, v. *Brooks*, Am. Law. Reg. 524.

(To be continued.)

CRITICISMS ON THE REPORTERS.

We now proceed to redeem a promise which we made in these columns about a year ago—that is to publish from our memoranda, comments, chiefly judicial, which have been from time to time made upon the Reporters. Many notices which we had culled were forestalled by a selection we then availed ourselves of from the *American Law Review;* and more recently (last month) we find that a continuation of the same selections, in the same periodical, also republished by us, has still further diminished our store. Still we can supply some points that the collector on the other side has not gathered up, or has mislaid, and we hasten to disclose what is left in our Note-book.

Of course everyone knows that Mr. Wallace's book on "The Reporters" is *the* text-book on the subject. We are glad to learn that a second edition of this scholarly work is in process of preparation. What we publish now will not go over ground already traversed by the American author, or by the articles above referred to. We have endeavoured to lop off from our extracts everything so easily accessible as the contents of Mr. Wallace's pages, and of the columns of the *American Law Review.* At present we shall confine ourselves to the reporters,—afterwards we may pass to notices of the text-writers and legal authors.

Ambler's Reports.—It has been a frequent subject of regret, that a gentleman, who by a constant practice in the Court of Chancery for upwards of 40 years, was apparently so well qualified to publish the results of his industry, should have failed so remarkably in the task which he undertook. His reports are well known to be an extremely careless and imperfect production. The facts of most of the cases are stated shortly and defectively; in many the dicta of the judges, in some even the points themselves, have been erroneously reported. The only notice which some of the most important cases in the book have received, is a short memorandum of the point determined. The notes taken in the earlier part of his life evidently bear few marks of subsequent revision; and as no editor has yet come forward to verify his statements by reference to the Registrar's Books, the frequent discovery of errors has given a reputation for inaccuracy to the publication: Hon. R. H. Eden in preface (1818) to his reports, *temp.* Lord Northington. In Mr. Wallace's book on "The Reporters," it is said, "Ambler as originally printed was of imperfect authority. A new and much improved edition was given to the profession in 1828, by Mr. Blunt."

Brown's Chancery Cases.—"These cases are generally considered as too shortly taken; and this may be accounted for by the brief manner in which Lord Thurlow pronounced his decrees, seldom giving his reasons for his decisions." Bridg. Leg. Bib. 40.

"An inaccurate reporter." Per Lord Eldon, as noted in 20 Law Mag. 62.

Brown's Parliamentary Cases are reported in such a form that the grounds upon which they are decided can never be positively ascertained. 17 Law Mag. 58.

Bulstrode.—"One of the best reporters of his day. His writings are at once elegant and excellent." Woolrych's Serjeants, xxvi. n. and 380.

Burrows' Reports.—Having occasion to point out an error in the statement of facts in a case in Burrows, Lord Eldon goes on to observe, "Speaking with all deference, but with due anxiety for the information of those for whom these books are written to instruct, I cannot

help saying, this is not the only instance, how extremely difficult it is to rely upon the circumstances stated as reasons for the judgment." *Clarke* v. *Parker*, 19 Ves. 20.

In Greenleaf's Overruled Cases, p. 73. it is said, "Burrows' reports were not published till 9 years after the decisions with which they commence were given; and they contain but a small part of the cases decided by jury and in *bank*; the whole number being about 800 annually; or about 25,000 for the 32 years during which Lord Mansfield was Chief Justice."

Campbell's Reports.—"One of the most valuable collections of Nisi Prius Cases we possess." Per Ball, J. in *O'Malley* v. *O'Malley*, 12 Ir. L. R. 112.

"Whoever looks through Campbell's reports, will be greatly surprised to see among such an immense number of questions, many of the most important kind, which came before that noble and learned Judge, Lord Ellenborough, not that there are no mistakes, but that he is in by far the most of the causes, so wonderfully right, beyond the proportion of any other Judge." Per Mansfield, C. J., in 5 Taunt. 195.

Carrington & Payne's Reports contain many unimportant cases, and compare unfavourably with Moody & Malkin's Reports: 3 Law Mag. 210; and see *Readhead* v. *Midland Railway Company*, 17 W. R. 739.

Carter's Reports.—In a copy once the property of C. J. Treby, there was written during the lifetime of the reporter by the Judge on the fly-leaf of the volume, this memorandum: "These Reports are published by Samuel Carter, a Barrister of Inner Temple, who lives at Birmingham, in Warwickshire, but they are said to have been taken by some other person." Albany Law Journal, Dec. 2nd, 1871.

Carthew's Reports.—"Carthew is a book of great authority and accuracy, and I find that Chief Justice Willes says, 'I own Carthew was a good and faithful reporter;' and Lord Kenyon says that he is 'in general a good reporter.'" Per Fitzgerald J. in *Scovell* v. *Gardiner*, 16 Ir. C. L. R. 347.

Chancery Cases, (Vol. II).—"Not entitled to any great attention." Per Sir W. Grant in *Richards* v. *Chambers*, 10 Ves. 580.

Chitty's Reports.—"A reporter of no great authority." Per Blackburn, J., in *Attorney-General* v. [illegible], 13 W. R. 1117.

Coke's Reports.—"It may not be out of place here to observe that the resolutions of the Judges, as reported by Sir Edward Coke, often go beyond the facts of the cases in which we find them reported; but this has not been held to detract from their authority. Such is the weight attached to those positions of law which are handed down by the 'Great Reporter,' and have received the sanction of his approbation, that they have been generally received and venerated as maxims in our law." Per Crampton, J., in *Coppinger* v. *Bradley*. 5 Ir. L. R. 274.

"The authority of Lord Coke on Admiralty Jurisdiction is inaccurate and untrustworthy," Per Sir W. Phillimore in *The Sylph*, L. R. 2 Ad. & Ec. 27.

"I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law." Per Best C.J., in 2 Bing, 296.

"The 12th part is not so accurate as the rest, not having been published by him, but from his notes after his death." Per Holroyd, J., in *Lewis* v. *Walter*, 4 B. & Ald. 614. Mr. Hargrave in 11 St. Trl. 40, says they were posthumous and loose collections of papers, neither digested nor intended for the press by the writer. And see also in *McPherson* v. *Daniels*, 10 B. & C. 275, where Parke, J., after referring to these Comments says the 12th Rep. is "not a book of any great authority."

Cooper, C. P. Select Cases, temp. Brougham.—A curious disclosure respecting this work will be found in 15 Law Mag. 146, from which it appears that the publication was undertaken at the instance of Lord Brougham with a view to correct certain erroneous propositions advanced by him, and reported as actually delivered in Mylne and Keen. These latter reports are there said to be of greater accuracy and ability than this collection.

APPOINTMENT OF QUEEN'S COUNSEL.

The following is the correspondence brought down to the House of Commons, between the Government of Canada and that of Ontario, relating to the appointment of Queen's Counsel. It commences with a communication from the Governor-General to the Earl of Kimberley:—

Ottawa, 4th January, 1872.

My Lord,—I have the honor to enclose for Your Lordship's consideration a report drawn up by the Honorable the Minister of Justice (Sir John A. Macdonald), on a question which has been raised as to the power of appointing Queen's Counsel for the Provinces.

2. I shall feel obliged if Your Lordship will have the goodness to procure the opinion of the Law Officers of the Crown, and communicate to me your decision on the question of Prerogative.

3. Questions will probably be put upon the subject to the Ministers soon after the commencement of the approaching Session of Parliament, *i. e.*, soon after the middle of next month.

I have, &c.,

Lisgar.

To The Right Hon. Earl of Kimberley.

Department of Justice,
Ottawa, 3rd January, 1872.

The undersigned has the honor to report to Your Excellency that the question has been raised by the Government of the Province of Nova Scotia, as to whether they have the power of appointing Queen's Counsel for the Province, their opinion being that they have no such power.

The undersigned is of the opinion that, as a matter of course, Her Majesty has directly, as well as through her representative the Governor-General, the power of selecting from the Bars of the several Provinces, her own Counsel, and, as *fons honoris*, of giving them such precedence and pre-audience in her Courts as she thinks proper.

It is held by some that Lieutenant Governors of the Provinces, as they are now not appointed directly by Her Majesty, but by the Governor-General, under "The British North America Act, 1867," clause 58, do not represent Her sufficiently to exercise the Royal prerogative without positive statutory enactment.

This seems to have been the view of Her Majesty's Government in 1864, when they refused to confer the pardoning powers on the Lieutenant Governors.

(See despatch of Mr. Cardwell, of 3rd December, 1864; also, Lord Granville's despatch of 24th February, 1869.)

On the other hand, it is contended that the 64th and 65th clauses continue to the Lieutenant Governors the powers of appointing Queen's Counsel which they exercised while holding Commissions under the Great Seal of England.

Reference is also made to the 63rd section, by which the Lieutenant Governors of Ontario and Quebec appoint Attorney Generals, and the Lieutenant Governor of Quebec also a Solicitor General.

However this may be, it will be seen that by the 92nd clause of the Act, it is provided that, "The Legislature of each Province may make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

Under this power, the undersigned is of opinion, that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provisions with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

As the matter affects Her Majesty's prerogative, the undersigned would respectfully recommend that it be submitted to the Right Honorable the Secretary of State for the Colonies, for the opinion of the Law Officers of the Crown and for Her Majesty's decision thereon.

The questions for opinion would seem to be:

(1.) Has the Governor General (since 1st July, 1867, when the Union came into effect) power, as Her Majesty's representative, to appoint Queen's Counsel?

(2.) Has a Lieutenant-Governor, appointed since that date, the power of appointment?

(3.) Can the Legislature of a Province confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel?

(4.) If these questions are answered in the affirmative, how is the question of precedence or pre-audience to be settled.

All of which is respectfully submitted.

John A. Macdonald.

Downing Street, 1st Feb., 1872.

My Lord,—In compliance with the request contained in your despatch, No. 1, of the 4th January, I have taken the opinion of the Law Officers of the Crown on the questions raised therein, with regard to the power of appointing Queen's Counsel in the Provinces forming the Dominion.

I am advised that the Governor General has now power, as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment.

I am further advised that the Legislature of a Province can confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel; and, with respect to precedence or pre-audience in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor, as above explained.

I have, &c.,

KIMBERLEY.

To The Governor-General.

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 2nd October, 1872.

On a memorandum, dated 28th September, 1872, from the Hon. the Minister of Justice, reporting that it appears by the Ontario "Official Gazette," of the 16th of March last, that the Lieutenant Governor of that Province appointed the following gentlemen to be Queen's Counsel:—

Danl. McMichael, of Osgoode Hall, Esq., Barrister-at-law			
William Proudfoot,	"	"	"
Chris. Salmon Patterson,	"	"	"
Edmund Burke Wood,	"	"	"
John Anderson,	"	"	"
Samuel Hume Blake,	"	"	"
Thomas Moss,	"	"	"

The Minister states that, being of opinion that in the absence of legislation on the subject, the Lieutenant Governor of a Province of the Dominion had not, since the 1st July, 1867, the right to exercise the Royal prerogative in the appointment of Queen's Counsel, but that such power was vested in the Governor General, as Her Majesty's representative; he made a report to that effect, and His Excellency the late Governor General transmitted such report to the Secretary of State for the Colonies, for the purpose of obtaining the opinion of the Law Officers of the Crown on the subject.

That by a despatch, dated 1st February last, Lord Kimberley informed Lord Lisgar that the Governor General had the power, but that a Lieutenant Governor appointed since the union came into effect had not the power of appointment.

That under the circumstances, great doubt must exist as to the validity of the commissions issued to the gentlemen named.

That by the law of Upper Canada, Queen's Counsel can, in certain cases, at the request of a Judge of the Superior Courts, perform certain judicial duties, such as the trial of civil and criminal cases. That their authority to act might be disputed, and that if it were eventually decided to be illegal, a failure of justice would be the consequence.

That under these circumstances, as the gentlemen mentioned are fully qualified to perform the duties of Her Majesty's Counsel, the Minister of Justice recommends that commissions be issued by the Government of Canada to those gentlemen, or such of them as desire to receive the same.

The Committee submit the above recommendation for Your Excellency's approval.

Copy of a Minute of Council, approved by His Excellency the Lieutenant Governor, the 23rd day of October, A. D. 1872, and sent to the Secretary of State for the Provinces.

The Committee of Council would respectfully call your Excellency's attention to the fact, that some of the gentlemen whom your Excellency appointed Queen's Counsel for Ontario, on the 16th March last, have during the present month received from the office of the Honourable Secretary of State for Canada, letters in the following form:—

Department of the Secretary of State,
Ottawa, 7th October, 1872.

Sir,—I have the honour to inform you that the question having been raised in the Province of Nova Scotia as to where the power of appointing Queen's Counsel rested since the Union of the Provinces, His Excellency the Governor-General, on the 4th January last, obtained through the Right Honourable the Secretary of State for the Colonies, the opinion of the Law-Officers of the Crown in England on the subject. These officers advised that the Governor General has now the power, as Her Majesty's Representative, to appoint Queen's Counsel, but that a Lieutenant Governor appointed since the Union came into effect, has, in the absence of legislation, no such power of appointment.

Under these circumstances, and to remove all possible doubt as to the legality of your status as one of Her Majesty's Counsel for the Province of Ontario, I am commanded by His Excellency the Governor General to inform you that a Commission will be issued under the Great Seal of Canada, appointing you Queen's Counsel for Ontario should you desire it.

I have the honour to be, &c.,

E. Parent,
Under Secretary of State.

The Committee regret that the Government of Canada, entertaining the view that the opinion of the Law Officers referred to in this letter was applicable to Ontario, should not have thought fit to transmit a copy of it for your Excellency's information. Although your Excellency's Government is of the opinion that your Excellency is invested with the power to make such appointments without Legislation, yet had they been made aware of the view of the Law Officers, they would have thought it proper to propose the Legislation requisite for the removal of any possible doubt on the subject, and having now become aware of it, it is their intention to propose such Legislation during the Session which is to commence within a few weeks. It appears to the Committee that grave inconveniences and complications may arise from the proposed action of the Government of Canada.

The Committee entertain the view that appointments of this description fall properly within the local, and not within the federal jurisdiction, and they trust that having regard to their expressed intentions as to legislation, the Government of Canada may see fit to abstain at present from issuing the proposed Commissions.

Should that Government, however, be of opinion that, notwithstanding the proposed legislation, the power of issuing such Commission would remain with and should be exercised by His Excellency the Governor General, it appears to the Committee that before acting on that view, the opinion of the judicial Committee of the Privy Council should be taken on a joint case to be argued on behalf of the respective Governments.

The Committee purposely abstain from entering into any discussion of the constitutional point, but they are bound to state that in their opinion the proposed action involves questions of local and federal jurisdiction far wider than the single question under discussion, and this renders them the more anxious that the course they propose should commend itself to His Excellency the Governor General.

The Committee advise that your Excellency should communicate this minute of Council to the Secretary of State for the Provinces.

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 13th December, 1872, and sent to the Lieutenant Governor of Ontario.

The Committee of the Privy Council to whom was referred the despatch of the Lieutenant Governor of Ontario, dated 28th October, 1872, covering a Minute of the Executive Council of that Province, on the subject of the appointment of Queen's Counsel, beg leave to report:—

That considerably more than a year ago, the attention of the Government was called to the expediency of appointing Queen's Counsel in Nova Scotia.

It appeared that, according to the practice that obtained in that Province, criminal prosecutions are generally conducted by Queen's Counsel, and it was stated that there was not a sufficient number of professional gentlemen, holding that rank, to perform the criminal business satisfactorily.

As the question, where the power of appointment rested, had been mooted in the newspapers, and it was one that affected the Royal Prerogative, it was deemed expedient to pursue the usual course in such cases, and to submit the question for Her Majesty's consideration, and for the opinion of the Law Officers of the Crown.

This opinion was obtained, and it was to the effect that the Governor General has the power, as Her Majesty's Representative, to appoint Queen's Counsels, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment.

Her Majesty was further advised in such opinion that the Legislature of a Province could confer, by statute, upon the Lieutenant Governor, the power of appointing Queen's Counsel, and of settling the practice as to precedence or pre-audience in the Courts of the Province.

No appointments of Queen's Counsel for Ontario have yet been made by the Governor General.

The Lieutenant-Governor of Ontario has given Commissions as Queen's Counsel to seven members of the Bar, as appears by the *Ontario Gazette* of the 16th March last.

The validity of these appointments was at once questioned by the profession and in the press. Had the question been merely one involving pre-audience in the Courts, the Government would have left it to the decision of those Courts, but by law a Superior Court Judge in Ontario has the power of deputing any of Her Majesty's Counsel to perform his judicial duties, both civil and criminal, at the assizes.

In case any of the Counsel who have lately received commissions from the Lieut. Governor should act for a Judge at the Assizes, and the invalidity of the Commission be afterwards established, serious consequences might ensue, as all

the proceedings in Court before him would be illegal, and *coram non judice* to the great disturbance of the administration of Justice both Civil and Criminal.

Under the circumstances, and to remove all doubt, the Minister of Justice recommended that his Excellency the Governor General should grant commissions to such of the gentlemen appointed by the Lieut. Governor as desired to receive the same.

The Minute of the Executive Counsel of Ontario states, that although they are still of opinion that the Lieut.-Governor had the power to grant such commissions, it is their intention, in order to remove all doubts, to submit a measure to the Provincial Legislature on the subject.

The Committee of the Privy Council can make no objection to that course being taken. They do not, however, see that such Legislation can in any way affect the power of Her Majesty through Her Representative to appoint Her own Counsel, and to grant them commissions as such, and they cannot recommend the surrender or relinquishment of the prerogative of appointment.

The Executive Council of Ontario recommended a reference of this question to the Judicial Committee of the Privy Council.

Had this suggestion been made before the assumption of the power of appointment by the Provincial Government, it might properly have been adopted, but under present circumstances it would seem that the question should be dealt with in the first instance by the Courts of Ontario.

The Committee of Council do not apprehend that any inconvenience or complications can arise from the Queen's Representative exercising the Royal prerogative in making such appointments.

It is obvious that when the Supreme Court, or other Dominion Courts are established, commissions issued by the Lieut. Governor would not, as of right, give precedence or position in those Courts. At the same time it might be advisable that such commissions should be recognized.

The Committee of Council are therefore, on the whole, of opinion, that His Excellency the Governor General, as the Queen's Representative, should not refrain from appointing Her Majesty's Counsel; but they think an arrangement might advantageously be made between the Government of the Dominion, and the several Provinces, by which Queen's Counsel, appointed by the Governor General, would receive proper status and position in the Provincial Courts, and commissions issued under Statutory authority by the Lieutenant Governors would be recognized in the Courts of the Dominion.

Certified. (Signed,)

Wm. A. Himsworth,
C. P. C.

CONTEMPT OF COURT.

A case has recently been decided by the Court of Queen's Bench in England, *(Ex parte Joliffe)* which is the latest authority with reference to contempts of Court, referring especially to contempts of inferior Courts.

An attorney published in a newspaper a letter complaining of the conduct of a County Court judge in a cause in which he was interested. Thereupon the judge ordered the writer of the letter and the publisher of the newspaper to appear before him to answer for their contempt. These then applied to the Court of Queen's Bench for a prohibition to restrain the County Court judge from further proceedings. The Court of Queen's Bench made the rule for a prohibition absolute. They said there was no authority in favour of the proposition that the judge of an inferior Court has power to deal summarily with contempt not committed in the face of the Court, and there was no reason upon principle in favour of such a power. Cockburn, C. J., also expressed his opinion that the fact that the County Courts Act, 9 & 10 Vict. c. 95, ss. 113, 114, (similar to the provisions in our Division Courts Act, Con. Stat. U. C., cap. 19, sec. 182), gave a limited power of summarily dealing with contempt committed in face of the Court, but was silent as to contempt committed out of Court, was a strong, if not conclusive argument against the summary power claimed by the County Court judge.

The *Law Journal* thus discourses upon the case we have referred to :—

"It was admitted that, for a contempt committed in the face of the Court, the County Court judge has full power to commit the offen-

der; but the power to punish for a contempt of Court, not committed in the face of the Court, is a power that appertains only to the Superior Courts. This power can be traced to a time when all the Courts were *curia regis;* but the County Courts are the creation of an Act of Parliament, and their power of punishing for contempt of Court is clearly limited to a contempt committed in the face of the Court. It is true that a County Court is a Court of record, but that does not confer upon it the power that belongs to the Superior Courts, which were the Supreme Courts of the Sovereign. We apprehend the ruling of the Court of Queen's Bench is correct beyond question.

A County Court judge is not without means of redress if he is calumniated, or if anyone is guilty of conduct calculated to affect the administration of justice. The County Court judge can proceed against the offender by indictment or by criminal information. Mr. Justice Quain remarked that the power of committal for contempt not committed in the face of the Court was exercised by the Superior Courts under the greatest possible sense of responsibility, and that 'to confer such a power upon some sixty judges sitting about the country would be very dangerous and detrimental to the due administration of justice.' No doubt about it. A County Court judge is not subject to the same ordeal of public criticism as the judge of a Superior Court, because the proceedings of his Court are not so fully or so regularly reported. Now, if complaint of the conduct of a County Court judge—not in Court, but out of Court—subjected the complainant and the publisher of the paper to imprisonment during the pleasure of the County Court judge, the public confidence in the County Courts would be shaken.

We do not say that the County Court judges would abuse their power, but, whether they did so or not, they would be suspected. It would, therefore, be inexpedient to confer such a jurisdiction on County Courts. It is also needless, because the Act gives them authority to punish offenders for a contempt committed in the face of the Court, and for contempts committed out of Court they have the protection of the general law."

There is a great deal of business before the Common Law Courts this term, but so far little has been done, the reason apparently being that counsel are not ready with their cases.

SELECTIONS.

THE LAW OF CLUBS.

A Club is not a partnership, and the rights and liabilities of its members *inter se*, and towards the public, are not regulated by the law of partnership. In the matter of the St. James' Club, 2 D. G. M. & G. 383, Lord St. Leonard said: "The law, which was at one time uncertain, is now settled that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen." And again he says: "The individuals who form a club do not constitute a partnership nor incur any liability as such." This case decided also that clubs are not "associations" within the meaning of the winding-up acts of 1848–9. The later acts relative to "winding-up" do not change the law as to clubs as laid down in this case. The case of *Fleemyng* v. *Hector*, 2 M. & W., 172, decided in 1836, is the leading case in England in respect to the liability of individual members of clubs for supplies furnished to the club. The "Westminister Reform Club" was organized under the following rules: That the initiation fee should be ten guineas; that the annual subscription should be five guineas; that if any subscription was not paid within a limited time, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club; and that all the members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them. The court held, in an action by an outsider against a member to recover for supplies furnished, that the individual members were not personally liable; for that the committee had no authority to pledge the personal credit of the members. Baron Parke, in his opinion, used the following language: "The rules of the club forms its constitution. . . . This action is brought against the defendant on a contract, and the plaintiff, must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind. . . . It is upon the construction of these rules that the liability of the defendant depends." In order to

render a member of a club liable, it must be made to appear that the rules of the club specially authorized the incurring of the personal liability, or that the members distinctly asserted to it. *Todd* v. *Emly*, 8 M. & W., 505, was an action against a member to recover for the price of wine furnished to the committee of a club. Baron Alderson said, that, "in order to establish the liability of the defendant, the jury should have been satisfied that what was done was not only within the knowledge of the committee generally, but also within the particular knowledge of the defendant." See, also, *Reynell* v. *Lewis*, 15 M. & W., 517; *Wood* v. *Finch*, 2 F. & F., 447. There are a few cases in which personal liability was held to exist upon grounds not at all infringing upon the doctrine of the above cases. In *Cross* v. *Williams*, 7 H. & N., 675, R. 302, an officer of a volunteer rifle corps was held responsible for uniforms furnished to the corps by a tailor, upon the principle that the officer had pledged his personal credit. In *Cockerell* v. *Aucompte*, 26, L. J. C. P., 194; 2 C. B. N. S., 440, the members of a club were held liable for coal purchased by the secretary, on the ground that the constitution of the club authorized the pledging of their personal credit.

Waller v. *Thomas*, 42 How., 237, was an action for rent against the members of the "City Club," a body consisting of over seven members, and therefore coming within the company laws of the State, in which the principal question was, whether under the New York statutes of 1849, 1851, and 1853, the members could be prosecuted in their individual capacity before exhausting the remedy against them in their collective capacity. The court held that mode of action was optional, in the first instance. This case is not inconsistent with the general English law on the subject of club liability.

The relations of committees to the remaining members of the club have not been judicially established, but where committee-men incur positive liability, their remedy over against the other members would depend upon the nature of the agency.

With regard to the funds of the club, it may be remarked that a court of equity will interfere to prevent waste or improvidence: *Charitable Corporation* v. *Sutton*, 2 Atk., 400; 7 Beav., 601. The court will not usually interfere to reinstate an expelled member. In *Hopkinson* v. *Marquis of Exeter*, 37 L. J. Ch., 173; L. R., 5 Eq., 63, by the rules of the club of which plaintiff was a member, it was made the duty of a general committee to arraign any member whose conduct or character was injurious to the interests of the society. Plaintiff was expelled in the prescribed manner, but the court would not interfere, no caprice or wrong motive being proved. In *Gardener* v. *Freenalte*, 19 W. R., 256, the power of expulsion was placed in the discretion of the committee, and the court would not interfere.

We are not aware of any cases that have been decided in Scotland with regard to clubs.—*Edinburgh Law Magazine.*

FORENSIC ELOQUENCE.

The successful advocate must be a man of quick sensibility. He must, for the time being, place himself in the situation of his client. To many men this is impossible; cold and impassioned, the joys or sorrows of others produce in them but little emotion. By one of this temperament the wrongs of his client are described with an unruffled countenance and unfaltering voice.

It is doubtless true that a man of enlarged mind can feel no very deep interest in the result of many of those disputes which seem to the immediate parties of the very highest consequence; yet it is equally true that he who can most completely identify himself with his client will be most successful. It does not necessarily follow that the advocate must use the same language that his client would use. What would seem very natural and proper in the mouth of the latter, would seem unnatural and improper in the former. As the smallest object held close to the eye appears of vast size, so every thing connected with our own interest assumes an importance entirely disproportioned to its real value. To the poor man the robbery of his hen-roost is of far more consequence than the overthrow of a distant empire, nor would he think the most glowing language misapplied in the description of his loss.

The more just the advocate's perception of the relative value of the things, the quicker his sense of the ridiculous, the less inclined will he be to sympathize with his client, and to indulge in that inflated style which the latter would himself use. Hence, he may appear to the parties interested, cold and indifferent, when in fact he has adopted the only course that would save him from the open ridicule of the court and jury.

Perhaps no man ever entered more entirely into the feelings of his client than Erskine. The fear of compromising his dignity by appearing deeply interested in trivial matters, he never felt; without passing over the limits prescribed by good taste he was ever earnest and impassionate. This warmth and sensibility, while they gave him that influence over a jury which earnestness always exerts, preserved him from those mere oratorical displays which men of colder temperament are apt to make. In all his pleadings he never introduces a topic to show his own learning or eloquence. There is no brilliant declamation, composed in the closet and thrown in for the purpose of exciting the admiration of the audience. Every thing seems naturally to arise from the subject, and tends to help forward the argument. He speaks just as he would have spoken had he been arguing his own cause, never using those gaudy decorations, or seeking those fanciful illustrations which suggest themselves only to the cool and indifferent mind. Nothing can be more striking than the contrast in this respect between him and Sir James Mackintosh. Sir James, when at the bar, never lost sight of himself. Between himself and his client there was a great gulf fixed, which he could never bridge over. His famous oration in behalf of Mr. Petien was a learned, ingenious, and in some parts eloquent performance; but much of it would have found quite as appropriate a place in his lectures on the law of nations. So little connexion had it with the immediate subject-matter of the prosecution, that Mr. Petien is said to have complained bitterly that he was sacrificed to the personal vanity of the advocate.

There is, it must be confessed, something a little ludicrous in the spectacle of a man pleading with the greatest vehemence and energy in defence of those interests which he would have attacked with equal vehemence and energy had he been retained upon the other side. To superficial observers, this earnestness and apparent conviction of the goodness of his cause seem feigned, yet we see no reason to doubt that in the great majority of cases he is perfectly sincere. He acts under the guidance of a principle which governs to a greater or less degree the conduct of every man. Every day men argue in support of opinions which they have adopted without mature consideration. He who strives to convince another of the truth of any proposition, however unsuccessfully, almost always ends by convincing himself. Many a religious and political disputant has become, by the force of his own reasoning, a convert to those doctrines which he at first defended only in sport. With the advocate it is a matter of entire indifference which side he espouses. Nor can this indifference be charged upon him as a serious offence; it is but rarely possible for him to know in advance the merits or demerits of his cause; and when, by the examination of witnesses, the facts fully appear, his feelings are then too much enlisted to allow him to weigh the arguments with impartiality. Like the soldier on the battle-field, he is but ill fitted, in the ardour of the contest, for a calm investigation whether it is not possible that he may be fighting on the wrong side.

With the judge the case is entirely different. He sits as a moderator—one who moderates and restrains the warmth of the contending parties. It is his duty to sum up, impartially and dispassionately, the arguments on both sides. There is no sight in the universe of greater moral sublimity than that of an able, upright and impartial judge sitting on the seat of judgment. His clear and capacious intellect disentangles the most complicated and intricate questions. He penetrates, at a glance, through the subtile sophistries of the advocate. With a word he dissipates the spell which his ingenious and seemingly unanswerable reasoning has thrown over the minds of the jury. He lifts the veil from successful villainy, and illumines the darkest recesses of crime with a flood of light. Persecuted innocence reposes at his feet in safety. The high and the low, the rich and the poor, in his sight, as in the sight of the great Judge, are all equal. It is not he himself

that speaks; it is the law that speaks through him. The words fall from his calm and passionless lips as from the lips of a marble statue; human sympathy and feeling he puts far from him as delaying or diverting the free course of justice. He ceases to be a mere man; he is the impersonation of law. We stand before him as in the presence of a divine power —an oracle of God, whose voice is uttering the decrees of infinite wisdom.

It is not solely by the strength of his reasoning or the force of his eloquence that the advocate persuades the jury. They have, like other men, their prejudices and prepossessions, often strong in proportion as they are unreasonable; these must be understood and humoured. Their modes of thought, depending upon their pursuits, their positions in society, their degree of intellectual cultivation, are to be carefully studied; their countenance, their dress, their attitudes, must be carefully noticed. He who passes these by as matters of little moment, will often find himself defeated by an opponent far his inferior in learning and ability, but who better understood the character of the persons whom he is addressing. The contrivances of counsel to obtain the good will of the jury are sometimes very ungenerous and amusing. It was said by an eminent lawyer in one of the eastern States, when speaking of a learned brother, that the latter had the advantage of him in one respect. He was in the habit of using tobacco, and when engaged in his argument, would turn to some prominent juryman, who was a lover of the weed, and in an off-hand, familiar way ask him for a quid. The juryman flattered at finding such a similarity of tastes and habits between himself and the dignified counsel, would follow the example, and the good impression made on his mind was not unfrequently transferred from the advocate to his cause. Even so eminent an orator as Patrick Henry did not disdain to have recourse to vulgar phrases and vulgar modes of pronunciation, to gain the favourable ear of the illiterate; and Mrs. Martineau relates that Webster, at the trial of the Knapps, made careful inquiries into the dispositions of those to whom he was about to speak.

Juries often complain, and with great justice, of the tediousness and perplexity of the speeches to which they are obliged to listen. However wearied they may be, they can express their dissatisfaction only in dumb show. Coughing and stamping, and the other well-known means to which other audiences resort to drive away oratorical bores, are forbidden to them. So long as the advocate shall choose to speak to them, they cannot choose but hear. Something, perhaps, should be ascribed to the prejudices of clients, who estimate the goodness of speeches by their length, and who think that their interests have been neglected because little has been said about them. It should, however, be borne in mind, that although the hearer may be convinced early in the trial, yet it is impossible that the speaker should know that he is so convinced. He is bound by his duty to present all the arguments that he can think of, even at the risk of wearying those whose opinions are already formed. But for the series of tautology and repetition which are so common in congress as well as at the bar, there is no excuse.

Of all the eminent lawyers in this country, Aaron Burr was most distinguished for his power of condensation. Even when replying to a speech of Alexander Hamilton (no illogical reasoner), which had occupied nearly six hours in its delivery, he spoke only for an hour and a half. He never sacrificed his logic to his rhetoric; metaphors, similes and illustrations, of all kinds he unsparingly rejected when they contributed nothing to the force of his argument. In every thing he aimed at an energetic brevity. Strike out a single word from one of his sentences and, like an arch that has lost its keystone, the whole fabric falls. It may indeed be questioned whether he did not carry his love of brevity to excess, and did not fall into the error of clothing his thoughts in so plain and unadorned a dress as to render them distasteful to uncultivated minds. In what we have said we had reference solely to argument before juries. Argument before judges on technical points of law require talent of a very different order. No knowledge of human nature is required. There is no necessity for graphic description. Brilliancy of imagination and warmth of colouring are but stumbling-blocks in the advocate's way. There is no dispute about the facts. It is the knowledge of the precedents, the power of making subtle

distinctions, the vigour of the logic that we now seek. The ability to make comprehensive generalizations, which regardless of the letter of statute and precedents, shall be true to their spirit, is indispensable. The utmost precision in the use of terms is demanded, and no grace of language can supply the want of accurate definitions. Maps and figures would be here as much out of place as the demonstrations of Euclid. The avidity of Littleton is preferable to the gorgeous imagery of Burke. The end is indeed persuasion, but it is persuasion through the understanding.

From what has been said it is plain that there is little room for comparison between the eloquence of the bar and the eloquence of the senate and the pulpit. The merits of the forensic orator are peculiarly his own. The qualities which most attract the admiration of the world, are by no means those which best conduce to his own success in his own proper sphere. It is the quick and acute, not the philosophical and comprehensive intellect that acquires distinction at the bar. An Erskine succeeds where a Burke would fail. A Coke takes precedence of a Bacon. The inevitable effect of reasoning day by day, upon a great multitude of insulated facts, is to narrow the mind, and render it more and more incapable of those general classifications which are the boast and glory of philosophy. Were the study of the law pursued as it should be; the student looking at precedents but as the exponent of principles; separating that which has its origin in accident or caprice, and is therefore mutable and temporary, from that which is founded in the nature of man, and is therefore permanent and unchanging; understanding as well the scope of the whole as the practical working of the parts; in a word, regarding law as the science of legislation, it would, in Burke's words, be the noblest of all sciences. That it will be so studied, except here and there by some master mind, we have no reason to expect or hope. Most will be satisfied when they have found a case in point, and *sic ita lex* terminates all further investigation. If, indeed, law books and reports continue to multiply with the same appalling rapidity that they have done for a few years past, it will be absolutely impossible for the most powerful mind to do more that master the details. To look for stability and permanence in our jurisprudence is to look for fixed landmarks among the shifting sandhills of the desert. The last legislature outruns the acts of its predecessors. The last volume of reports can alone be looked upon as settling what is the existing law. So long as this shall continue the great body of our lawyers will be acute practitioners and but little more. Pre-eminent in their own department, they will make but little figure out of it. Ceasing to be learned and intellectual men, standing forth in the full development of all their faculties, and enriched with the treasures of all knowledge, they will sink to mere professional drudges. This is to some extent already the case. We see the man of most profound professional learning, ignorant of the elements of literature and philosophy, and boastful of his ignorance. We see the man of what is called "business habits," arrogating to himself a superiority over those, the extent of whose knowledge is, as compared to his, like the ocean to the smallest island that sleeps upon its bosom; we see Congress filled with third and fourth-rate men. But the evil will in time cure itself. From the very womb of darkness will spring forth light; the innumerable dark, winding passages which lead to the temples of justice, will give place to plainer paths. The axe of reform will hew down the venerable trees which have so long shaded the recesses, and will let in the clear light of day. When this has been done, when law shall cease to be an art and become a science, then will our country find among the members of the profession her greatest ornaments.—*Knickerbocker Magazine.*

The prospects of the Judicature Bill are at this moment very good. It has been read a third time and passed in the House of Lords, and a bill which reaches the House of Commons in the second week in May, which is backed by the whole power of the Government, and which has been settled by a select committee of persons most competent to deal with it, has more than a fair chance of becoming law. We shall expect to see the bill emerge from the Commons in substantially the same state as it is now in.

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COMMON PLEAS—HILARY TERM, 1873.

Ex rel. Bate v. The Corporation of the City of Ottawa.

By-law granting sum of money to an individual.

Where a Municipal Corporation passed a By-law granting $1000 to an individual, in consideration of his having advanced the amount in aid of a Railway Company. *Held*, not within the powers of the Corporation and therefore quashed.

Semble, that it would make no difference even if they had surplus funds in hand.

Roe v. Roper.

Incomplete distress—Possession taken under chattel mortgage—Replevin.

Where a bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession, or take any further steps to execute the warrant, and after the lapse of more than a month, a person having a chattel mortgage on the goods, took possession under the mortgage, and removed the goods, for which the landlord brought replevin. *Held*, that under the circumstances, the landlord was not entitled to maintain the action.

Harrison v. Preston.

Action for balance of purchase money of land—Receipt under seal for whole—Estoppel.

In August, 1867, plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question was raised as to plaintiff's title to the property, and defendant did not pay over the whole of the purchase money, but retained $100 of it, and in October following gave the plaintiff the following agreement:—"Harriston, October 1st, 1867, 15 months after date, I promise to pay to the order of William Harrison, or bearer, the sum of $100, providing that the title is good, on lots known as Town Hall, Court House, and Fair Ground, situated on the north side of Elora street, for value received," these being the lots conveyed by the deed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded amongst other pleas, payment.

Held, that as the promise was merely to pay the balance of the consideration money mentioned in the conveyance, and by the deed and receipt endorsed admitted to be paid, the plaintiff was estopped and could not recover.

In re Great Western Railway Company and the Corporation of the Township of North Cayuga.

By-law—Repeal of.

The Corporation of the Township of North Cayuga, under power given them by 33 Vict. ch. 33, sec. 18, Ont., an act incorporating "The Canada Air Line Railway Company," afterwards amalgamated with the Great Western Railway Company, passed a By-law which recited the Statute, and that the Railway had been located in North Cayuga, and provided that all the real property in the Township should be rated at $12.00 per acre (the average rate,) for 50 years. This By-law was subsequently repealed by a By-law formally passed for that purpose, but it did not appear that upon the special faith and consideration of the original By-law that the applicants had in fact altered their position, or done anything which they otherwise would not have done, but that the Railway would have traversed the Township, whether the Municipality had or had not exercised their statutable powers.

Held, on an application to quash the repealing By-law, that the Court under the circumstances could not interfere.

In the matter of the Trustees of the Port Rowan High School and the Corporation of the Township of Walsingham.

High School Trustees—Description of—Demand—Sufficiency of—Maintenance and School accommodation—Meaning of.

In an application for a mandamus to compel a municipal corporation to provide $286.74 for a Board of School Trustees, they were described in the proceedings as "The Trustees of the Port Rowan High School;" and it appeared that on the 1st July, 1872, a demand was made on the Township Corporation, headed "School Section, No. 12, Walsingham. Port Rowan, July 1st, 1872," and stating that the amount required was "for expenses of conducting High School," and was signed "William Ross, Secretary and Treasurer of Port Rowan High School Board." Subsequently to this, on the 19th August, 1872, the Secretary of the Board sent a letter to the Clerk of the Township Corporation, headed, "Office of the High School Board, Section No.

12; Port Rowan, August 19, 1872," stating, that in making up the estimates for the "current expenses of High School" an error had been made, and that the amount actually required was $286.74, which amount he was required to make immediate demand for from the Council. In reply to this, the Township Clerk sent a letter, addressed, "To —— Ross, Secretary Port Rowan High School Board," enclosing copy of a resolution passed by the Township Council, stating that they declined to pay "the demand of the Port Rowan High School Trustees."

Held, 1. Description of Trustees sufficient; for, although "The Trustees of the Port Rowan County High School" would appear to be the more correct one, yet the Act 34 Vict., ch. 33, Ont., did not in express terms require it, and the Township Corporation, by their action, had shown that they fully understood the body with whom they were dealing.

2. Demand sufficient; (*a*) for, though only signed by the Secretary and Treasurer, yet he was the officer and organ of the Board, and the resolution of the Township Council recognises it as the demand of the Board. (*b*) That it was not necessary to give the estimates on which the sums required were based. (*c*) That the purposes for which money was stated to be required, viz., "for expenses of conducting High School," and "current expenses of the High School," fell within the meaning of the words "maintenance and school accommodation."

Humphrey v. Wait.

Rooms let to lodger—Defective passage leading to—Owner—Liability of.

Where plaintiff rented a room in a house held by, but not in the personal occupation of the defendant, who lived in an adjoining house, the only mode of communication to this and the other rooms on the same story being by means of a certain passage in which there was an uncovered stove-pipe hole; and the plaintiff having agreed with the defendant to change her room for another one adjoining it, was in the act of moving her furniture from one room to the other when she put one of her legs through the stove-pipe hole and was injured.

Held, that the defendant was not liable to the plaintiff for the injury sustained by her, as he was not under any legal obligation to keep the premises in repair.

Hely v. The Canada Company.

Ejectment—Landlord and tenant—Forfeiture—Lease to persons in possession—General proviso for re-entry, and special power to determine lease on notice—Construction.

In ejectment against one M., the defendants appeared and defended, by order, as landlords in lieu of M. The plaintiff claimed under a covenant in a lease from him to M., oh right of re-entry for non-payment of rent, and non-performance of covenants, and the defendants, besides denying the plaintiff's title, claimed as grantees of the Crown. It appeared that the instrument set up by plaintiff as a lease, was an agreement dated 2nd April, 1867, whereby plaintiff agreed to sell the land to M. for £100, M. paying £10 each year and interest at 6 per cent. till the whole was paid; provided that if payments not made the interest due to be considered as rent, for which the plaintiff might enter and distrain; M. not to commit waste, &c., and to pay taxes; and in case of default in making the payments for three months, then he should surrender the premises to plaintiff; and M. agreed not to let or assign without leave. It also appeared that plaintiff held under a lease dated 23rd March, 1865, from the defendants for ten years, being one of the company's printed leases, which gave a right of re-entry for non-payment of rent and taxes and for assigning without leave; that four years rent was in arrear; defendants had paid the taxes for 1867 and 1869; and that there was no written authority to plaintiff to sell to M. The lease also contained, besides the general proviso for re-entry, a special power to determine the lease on a given notice. In February, 1872, defendants executed a lease to M. for seven years, but no evidence was given to show when it was actually delivered, nor whether the defendants were proceeding to entry or forfeiture; or had threatened M. with dispossession.

Held, that if it had been shown that M. took the lease from defendants to save himself from eviction, there would be no necessity for his going out of possession and then re-entering under the new demise, but as this evidence was wanting, a verdict found in the defendant's favor was set aside, and a new trial granted.

Held, also, that the general proviso for re-entry was not controlled or affected by the special power given to determine the lease on a given notice.

Held, also, that under the agreement between the plaintiff and M., plaintiff had the right to re-enter and take possession on default; and

the covenant to surrender possession after three months default could not alter the plaintiff's right.

Arnot v. Bradly.

Constable—Fine, Tender of to—Demand of perusal and copy of Warrant—Refusal—Issuing Warrant of Commitment in first instance —31 Vict., c. 60., C.

Held, that a constable acting under a warrant issued under the Fishing Act, 31 Vict., Ch. 60, C., directing him to convey plaintiff to gaol, and directing the gaoler to hold him for thirty days absolutely, and not until the fine, &c., be sooner paid, for the non-payment of which the warrant was issued, is not bound to receive a tender of the fine.

Where the plaintiff demanded from the constable the perusal and copy of the warrant, which was not given, the constable's excuse being that he had lodged it with the gaoler.

Held, no excuse, as he could have procured it from the gaoler within the six days, and so complied with the demand.

On the argument in term, it was urged that the defendant, being placed in the same position as the convicting magistrate, was bound to produce the conviction.

Held, that as no such objection had been raised at the trial, which, if raised, the judge would have naturally suggested, if necessary, its being then drawn up; and from all that appeared, the defendant might have produced it if called for; its non-production could not now be held to prejudice the defendant.

Held, also, under the Fishery Act, 31 Vict., c. 60, C., a warrant of commitment may issue in the first instance, the Statute not requiring before doing so that a distress warrant should issue.

Henderson *et al* v. White.

Ejectment—Lease—Demand of possession—Necessity of joinder of plaintiff at trial.

In an action of ejectment, it appeared that in 1863 the defendant entered on certain land belonging to St. John's Church, in the parish of Mono, with the assent of V., the then Incumbent, and the churchwardens, under a verbal agreement for a lease for sixteen years, the defendant to clear so many acres each year, put up certain buildings, and pay taxes. A lease was said to have been afterwards executed by one of the churchwardens, but it was not produced at the trial. It appeared that defendant had been in possession ever since, cleared about forty acres, erected the required buildings, regularly paid the taxes, and performed statute labor. It appeared also, that at the time the agreement was made the lot was held by Church Society, the patent having issued to them on account of their having, at the request and on behalf of the Parish, advanced the purchase money, upon the understanding, however, that upon re-payment by the Parish, the Society would convey the lot to them. In 1864 the Parish re-paid the Society, and a deed was executed by them, containing a recital of the terms on which they held, and granting it to the plaintiff, (who had succeeded V. as the incumbent), and his successors, incumbents from time to time of the said church. Habendum to plaintiff and his successors incumbents as aforesaid for ever, in trust for the endowment of the church and parish, with the proviso that no lease, or other disposition of said lands, should be made by any incumbent, without the consent in writing to be annexed to such lease of the churchwardens for the time being. It also appeared that at the time the action was brought, F. was the incumbent, having succeeded the plaintiff, and that neither he nor the plaintiff had in any way recognized defendant as a tenant, and although no demand was ever made by the plaintiff, yet F. had done so.

Held, that the alleged lease could not be upheld, as prior to the conveyance to plaintiff there was no one who had any authority to deal with the land, and subsequent to it, the defendant's right to be on the land was never in any way recognized, but on the contrary, always denied.

Held, also, that the proper course on the evidence was to allow a recovery in plaintiff's name as the grantee of the Society; the demand of possession (if necessary) made by F. enuring to plaintiff's benefit.

Semble. That no demand of possession, or notice was necessary, as it could only be as a tenant at will, or as in rightfully at one time under the person claiming, or some one in prioity with him that such demand would be necessary, and as against the plaintiff, the grantee of the Society, the defendant could show nothing.

On the argument in term, it was objected, that as F. who had been joined as a plaintiff at the trial, was not present when the amendment was made, his consent in writing should have been filed.

Held, that though this objection was raised at the time the amendment was made, yet as F. afterwards appeared and was examined as a

witness, and no question was then raised as to his assenting, or non-assenting, and the judge reported that there really was no question about it, the court would not entertain the objection.

COMMON LAW CHAMBERS.

(Reported by Mr. Frank Peyler, *Student-at-Law.)*

Levy v. Wilson.

Setting aside Judgment—Affidavit wrongly entitled.

[Mr. Dalton, 8th Jan., 1873.]

Judgment on default of appearance set aside for irregularity, on the ground that affidavit of service of writ entitled in the County Court instead of in the Queen's Bench.

Ansell v. Smith.

Venue—One party living out of the jurisdiction.

[Mr. Dalton, 14th Jan., 1873.]

In moving to change the venue the fact that one party lives out of the jurisdiction does not affect the equities between the parties.

Bank of Commerce v. White.

34 Vict., c. 12, s. 12, O.—Eight days notice to town agent.

[Mr. Dalton, 15th Jan., 1873.]

Held, that a notice to plead, within *eight* days, served on a Toronto agent, may be set aside as not being in compliance with *34 Vict., c. 12, s. 12, O.*

Re Credit Valley Railway & County of Peel Bonus.

36 Vict., c. 36, sec. 14—Ex parte Application for Enquiry—Particulars.

[Galt, J., after consultation with other Judges, 18th Jan., 1873.]

Held, 1. An application under the above section must be by summons, and if an order be obtained in the first instance, it will be set aside.

2. The enquiry must be confined to the particulars finally given by applicant.

Fleming v. Livingstone.

Jurisdiction—Prohibition—County Court—Set off.

[Gwynne, J., 24th Jan., 1873.]

Held, 1. On applications for prohibition, &c., the judge's notes at the trial should be accompanied by his report of the case.

2. Plaintiff in a County Court suit gives credit on a claim of $300 (for board, &c.,) for $170, being the value of an article received by him from defendant. Then although the agreement as to setting off the one against the other is made before the debt for which the action is brought is contracted, yet if (*a*) the amount to be allowed to defendant for the article can be treated as a payment of a portion of plaintiff's claim and not merely an unliquidated set off against it; or (*b*) the transaction can be viewed as a sale, first, of the article, upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant —the court has jurisdiction.

Nicholson v. Coulson.

29-30 Vict., c. 42, sec. 1—Staying proceedings till Costs of day in same suit paid—In Forma Pauperis —Abuse of Process.

[Mr. Dalton, 30th Jan., 1873.]

Held, 1. That 29-30 Vict., c. 42, s. 1 does not refer to costs of day in *same* suit, and consequently proceedings cannot be stayed in a suit in which costs of day have not been paid.

2. That, nevertheless, this can be done on the ground of abuse of the process of the Court where the proceedings are vexatious.

CHANCERY CHAMBERS.

(Reported by Thos. Langton, Esq., *Barrister-at-Law.)*

Re Tobin-Cook v. Tobin.

Representation to deceased party—Gen. Order, 56.

[Blake V.C. on appeal from Referee, 10th Feb., 1873.]

An order had been made for the administration of the estate of an intestate, accounts had been taken under it, and the Master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent.

The Court therefore under Order 56, made an order appointing as administrator *ad litem* the person who had been guardian of the infant heirs of the intestate, on the application for the administration order, he having also been Solicitor for the administratrix in her lifetime.

Fraser v. Home Ins. Co.

Production of documents.

[The Referee, 28th Feb., 1873.]

The Court will not act merely upon an allegation by a party seeking to protect documents from production, that they are not material, if it appear from their nature or otherwise that they may afford material assistance to the party seeking production in establishing his case.

When a party having a joint interest in documents with a stranger to the suit, has the sole legal possession thereof, production will not be ordered unless the suit be of such a nature that

the Court can say that the party having the legal custody sufficiently represents the other party interested.

But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit on production with as much particularity as was required in answering interrogatories as to documents under the former practice.

Merchants' Bank v. Tisdale.

Production of documents—Materiality of the issue in the cause.

[The Referee, 7th March, 1873.]

Before decree no discovery will be ordered which appears to the court to be immaterial to the question to be tried at the hearing.

Creswick v. Thompson.

Opening biddings—Gen. Order 388—Special grounds.

[The Referee, 8th March, 1873.]

The Court is strongly disinclined to open biddings, unless very special grounds are shown.

The fact alone that a price can be obtained in advance upon that realized at the sale, does not constitute such a special ground.

An inadequate description of the property in the advertisement will be a sufficient ground, if calculated to mislead or deter the public from purchasing, but not otherwise. Exceptions of this kind amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement should be taken upon the settling of the advertisement.

Paxton v. Dryden.

Motion to commit for disobedience of a direction of a Master—Evidence of default.

[The Referee, 8th April, 1873.]

A party moving to commit for disobedience of any order or direction of a Master, must show that the person moved against has disobeyed the order, and is in default, by means of a certificate of the Master.

It will be insufficient in Chambers to prove by any other means the service of the order, and that it has not been complied with, as the Master is the proper person to decide both these facts.

Smith v. Smith.

Interim Alimony.

[Strong V.C., on appeal from Referee, 24 Feb. 1873.]

A plaintiff makes out a *primâ facie* case for interim alimony by producing (1) an office copy of the Bill which need not be verified by affidavit, and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can show the contrary to be the case the application will be refused.

Redman v. Brownscombe.

Married Women—Next Friend—Security for Costs—Statutes—35 Vict., c. 16, s. 9 and 29-30 Vict., c. 45, § 1.

[The Referee, 12th April, 1873.]

A married woman brought a suit in her own name for redemption of lands in which she claimed an estate for life under a lease made in 1866. *Held*, not her *separate* property so as to enable her to sue without a next friend under 35 Vict. c. 16, § 9.

A former suit in respect of the same subject-matter, in which the Bill had been dismissed with costs to be paid by the next friend of the plaintiff, was considered as substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of the second suit.

A stay of proceedings until the costs of the former suit were paid was refused, there being a distinction in this respect between suits by married women and suits by persons *sui juris*.

Re Western Insurance Co.

Petitions—Practice as to—Irregularity—Dismissing for want of Prosecution.

[The Referee, 18th April, 1873.]

It is unnecessary and irregular to file a petition before it is heard. The proper proceeding in order to bring it before the Court is to serve a copy with a notice of a day for hearing endorsed.

This practice is applicable to petitions under the Insurance Co.'s Act, 31 Vict., c. 48. But as by this Act no special procedure is provided for making application under it to the Court, when proceedings were initiated by a *Petition* which had been filed but not served upon the Respondents, nor brought to a hearing after a lapse of fourteen months, it was treated as a Bill and ordered to be taken off the files for want of prosecution.

Re Goodhue.

Appeal—Costs of reference under a Decree reversed on appeal.

[The Referee, 6th May, 1873.]

The Court of Error and Appeal having reversed an order of Court of Chancery and directed

a Petition to be dismissed with costs, *held* that this did not entitle the applicants to costs of proceedings in the Court below subsequent to the order which was reversed.

Grant v. Winchester.

Security for costs—limiting time for putting in security.

[The Referee 25th March, 1873.]

A plaintiff who subsequent to filing of bill had gone to reside in Connecticut was held entitled to the same time for putting in security as a defendant served in Connecticut would under General Order 90 have been entitled to for answering a bill—such time to commence from the date of application to limit the time.

REPORTS.

COMMON LAW CHAMBERS.

Dain v. Gossage.

Administration of Justice Act, Secs. 59, 64—Construction of Statute—"Expressio unius, &c."

Held, 1. That under secs. 59 and 64 of the Administration of Justice Act, 1873, there should be no County Court Sitting in May of that year.

2. That the word "Section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment of which there may be several included under one numbering.

3. Consideration of conflicting clauses in same Act.

4. Application of the maxim, "*Expressio unius est exclusio alterius.*

[Chambers, May 1-5, 1873. *Mr. Dalton—Richards, C.J.*]

This was an application to set aside a notice of trial given for the County Court of the County of York, at a sitting of that Court, which the plaintiff assumed was then about to be held on the 13th of May then next.

The question in dispute arose on the construction of secs. 59 and 64 of the Administration of Justice Act of 1873. Section 59 will be found on p. 139 *ante*; sec. 64 is as follows:—

"Sections 46, 47, 51, 56, 57, 58, 62, and 63, of this Act, and so much of the 59th section as relates to the sittings of the County Court in September of every year, shall go into force forthwith, and the other sections shall go into force on and after the first day of January next."

Delamere shewed cause.

Francis, contra.

Mr. Dalton.—The important question is whether upon the construction of clauses 59 and 64, of the Administration of Justice Act lately passed, a sitting of the Court will be held on the 13th of May next. I have come to the conclusion that no such sitting can be held—and I have been led to it by the following considerations:—

The date of the assent shall be the date of the commencement of an Act, if no later commencement shall be therein provided: Stat. 31 Vict. cap. 1, sec. 4—(Interpretation Act.) Therefore the Administration of Justice Act of 1873 would be in force now in all its clauses, were it not for clause 64, which postpones its operation as, and to the extent in clause 64 expressed. In all respects in which that clause does not postpone the operation of that Act, it is in force now. Then clause 64 brings into immediate operation clauses 46, 47, 51, 56, 57, 58, 62, and 63, and *so much of section 59 as relates to the sittings of the County Court in September*, and it enacts that "the other Sections" shall go into force on and after the first day of January, 1874.

The question is as to the residue of clause 59. Is it in force now or not? Is the residue of clause 59 included in "the other sections" in clause 64?

I will first suppose it is not. Then by the express enactment of sec 64, that part of sec. 59 which relates to the Sittings of the County Court in September is in force now, and as to all the rest of clause 59, that too must be in force now, if it is not included in the words "the other sections," for if it is not postponed by sec. 64, it must fall under the general rule, and be in force from the assent to the Act. From this it would follow that the whole of sec. 59 is in force—that part as to the September County Court by express enactment, and the rest of the clause because its operation is not in any way postponed, and if this be so there will be a County Court and General Sessions in May, and a County Court and General Sessions in September. But can that possibly be the intention? I think not, as may be demonstrated.

The construction of an Act, whatever the rules which are to guide in arriving at it, must be what we believe is the *expressed intention.*

I would say that the clauses 59 and 64 do not raise an inconsistency which it is necessary to reconcile. Clause 64 is inserted for the purpose of defining the times at which the several clauses shall come into operation, and so regulating those other clauses, and for no other purpose. If it is inconsistent with any other clause it must be regarded as an afterthought and change of intentions in this respect. (See as to this the judgment of Lord Tenterden in *Rex* v. *Justices of Middlesex*, 2 B. & Ad. 821, citing *Attorney-General* v. *Chelsea W. W. Co.*, Fitzgibbon 159—the latter a case very much in point). As far as clause 64 enacts it must therefore govern, and from the very purpose of

clause 64, it follows that it must necessarily be inconsistent with the other clauses, or it would not have been inserted at all. Further the expression in clause 59 "*including the present year*" (which applies only to the May Courts) is nothing more than the law would imply if those words were not there.

I think the residue of clause 59 cannot be excluded from the words "the other Sections" in clause 64, from the following considerations:—

Clause 64 seems to be intended to declare the times for the Act coming into force, and it does declare them as to every part of the Act—unless it be those portions of clause 59, and it seems not likely that it could have been the intention to omit so small a part, where all the rest is declared. In saying this I do not lose sight of the words "*including the present year*" in the 59th clause. And if any one shall attribute force to these words, an answer is, that they are not applied at all to the enactment of sec. 59, as to the September General Sessions. This fact must be borne in mind in all that I have further to say.

Then, as to the expressed intention, what could be the purpose of inserting in clause 64, an express provision as to "*so much* of the 59th sec. as relates to the Sittings of the County Court in September?" If it were intended that the whole clause should come into operation forthwith, why was not clause 59 inserted in sec. 64 after clause 58, without any special mention of the September County Court? That would have been the natural way of expressing such a purpose. To my apprehension those words are meant to contradistinguish the enactment as to the September County Court, from the rest of clause 59. And if so, at *what time* is the rest of clause 59 to come into operation?

Again can this half section, with propriety, be held to be included in the words "the other sections" in clause 64? First observe that it says "*the* other sections." The word section has no technical meaning, nor indeed any very exactly defined meaning. No doubt it is usually applied to the numbered paragraphs of an Act, and in this very clause 64 it is used in that sense, but it does not necessarily mean that. It means a part divided or cut off, and it seems to me that after excepting a portion of clause 59, and then referring to "*the* other sections" of the act in a clause like 64 which seems to be purposed to declare the time of the Act taking effect, it may without any straining of language be held to apply to the residue of clause 59—if the apparent dominant intention of the Legislature require it. If a piece of chalk were broken in two each half would be a piece of chalk, and so if the section of an Act consisting of distinct parts, be divided, I do not see why each part should not, in one sense, be called a section, because each is really a distinct enactment, although each would not be a numbered paragraph. In our Real Property Act the same word "Rent," occurring repeatedly throughout the Act, is construed in three different senses, because the general intention required it. (See Leith's Blackstone pp. 206, 208). I put great stress here upon the expression, "*the* other sections," as though it were intended to include all the rest of the Act.

Then, as to the necessity of construing the Act, as in the last paragraph suggested. If the enactment in clause 59, as to the September General Sessions, is not within the words "the other sections," in clause 64, it seems to me it must come into force at the passing of the Act, or never come into force at all. Should any one think this proposition untrue, I would ask him to consider *at what time*, in such case, it comes into force, if not at the passing of the Act, and why. I think the proposition is true, but the supposition that the enactment is intended never to come into force is absurd—therefore it must come into force at the passing of the Act. Remembering then that it is the *expressed intention* that we are looking for, and that clause 64 enacts that "*so much*" of 59 as relates to the County Court in September, shall come into immediate operation, and that it is silent as to the General Sessions for that term, and as to all the rest of clause 59, the spirit of the maxim, "*Expressio unius est exclusio alterius*," applies, and to ordinary apprehension, what is said and what is omitted, together distinctly convey the intention of the Legislature that the residue of clause 59 shall *not* come into immediate operation. It is indeed a very strong expression, by exclusion, of that intention. The above maxim of construction has been lauded as one naturally arising—being a principle of logic and common sense, and never more applicable than when used in the interpretation of a Statute: Broom's Legal Maxims, 5th Ed., 664, 667. But, I take it, it affords from necessity just as strong an indication of another intention, which is, that the words "the other sections" shall include the residue of clause 59, because, if not, the enactment as to the September General Sessions must either come into force at the passing of the Act, which I think is proved to be against the intention, or never at all. The words in section 59, which apply to the holding of the May Courts,—"including the present year,"—can

make no difference—for they merely express what the law, in the construction of section 59, would imply, if those words were not there, and the enactment as to the May Courts must still be controlled by section 64, as being within "the other sections."

I therefore feel forced, step by step, to the conclusion that the whole of section 59 is postponed till January, except the part as to the County Court in September, and that, consequently, there is no sitting of the County Court this May.

The notice of trial must be set aside, but without costs.

From this judgment the plaintiff appealed to

RICHARDS, C. J. :—I quite concur in the conclusion arrived at by Mr. Dalton in his able judgment. I have also had the opportunity of consulting the Hon. the Chief Justice of the Court of Common Pleas on the subject, and he authorises me to say that he is of opinion that that portion of the 59th Section of the Act for the better Administration of Justice which provides for the Sitting of the County Court of the County of York, on the second Tuesday in the month of May, does not come into force until the first day of January next.

If that portion of the Act is now in force, then the whole section would seem to be in force, and if that was the intention of the Legislature it would have been much easier to have said that the 59th section shall go into force forthwith, than merely that so much of it as relates to the Sitting of the County Court in September of every year, shall go into force forthwith. I do not think, however, there is any mistake or inconsistency in the matter. It is probable when the Statute was introduced it was intended to bring the whole Act into operation at once. On further consideration it was no doubt thought better to postpone the bringing into force the principal enactments until after the first of January next, and therefore it was quite proper to postpone, until that period, the operation of all the sections that were framed with a view to carrying out the main portions of the Bill.

One of the prominent features of the Act was a fourth sittings of the Courts of Assize and Nisi Prius and Oyer and Terminer for the County of York. That sitting was to be held between the end of Easter Term and the beginning of the long vocation in July. Now the end of Easter Term of this year is Saturday the 7th of June. The second Tuesday of the month of June will be the 10th of June. If the County Court were to sit for a fortnight it would cover a portion of the same period for which the additional Assize Court would be sitting, under the new enactment for that purpose, if it had come in force. To prevent this, the change was provided for in the Bill of having the sittings of the County Court on the Second Tuesday of May instead of the second Tuesday in June. But as it was thought better that the additional sittings of the Assizes should not be held this year, therefore it was unnecessary to change the time for holding the County Court and the Court of General Sessions from June to May, and consequently that portion of section 59 which relates to the change need not be brought into operation until the rest of the Act was.

It was felt to be an evil that County Court cases were rushed in upon and swelled the dockets at the Assizes, particularly in the Fall, to the prejudice of the legitimate business belonging to the latter court. The County Court sittings in the County of York, for the trial of issues of fact, being in June, were not held again until December, a period of six months, and the Fall Assizes intervening, the evil referred to was felt to be pressing, and would be quite as much felt at the coming Fall Assizes as at any time. Principally to relieve this undue pressure of County Court business on the Assizes, the fourth sittings of the County Court and General Sessions was provided for in the Bill, and as no practical inconvenience would result from bringing that provision of the Statute into force, it would naturally occur to any one who knew of the evil complained of, that the pressure of business of the Fall Assizes of this year might be very much relieved by having a sitting of the County Court in September. If that idea was present to the mind of the framer of the sixty-fourth section he would be likely to make some provision in it for holding the September sittings of the County Court, and the words he has used shew that he did entertain the intention, and he seems to have used words to carry it out.

I see no reason why the simple, plain intent to be gathered from the 64th section, that only so much of the 59th section as relates to the sittings of the County Court in September should go into force immediately, and that the operation of the rest of the Act not brought into force immediately by the words of the 64th section, should be postponed until after the 1st January next.

I think the summons to set aside Mr. Dalton's order should be discharged. I do not understand the parties supporting the order ask or desire costs, and therefore I say nothing about costs.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 36th Victoria.

DURING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

Robert Heber Bowes.
Allan John Lloyd.
James R. Roaf.
John George Killmaster.
Isaac Baldwin McQuesten.

And the following Gentlemen received Certificates of fitness :

R. McMillan Fleming.
J. Bruce Smith.
J. George Killmaster.
James R. Roaf.
Allan J. Lloyd.
Isaac B. McQuesten.
Peter Cameron.
Rupert E. Kingsford.
Alexander Sampson.
Wickstead.

And on Tuesday, the 4th February, the following Gentlemen were admitted into the Society as Students of he Laws, their Examinations having been classed as follows :

University Class.

James Joseph Wadsworth, M. A.
Alexander Haggart, B. A.
Samuel Clarke Biggs, B. A.
Elliott Travers, B. A.
Julius Lefebvre, B. A.

Junior Class.

Charles H. Connor.
Thomas G. Meredith.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR JULY.

1. Tues... Dominion Day. Master and Reg. in Chy., Clks. and Dep. Clks. Crown, make ret. of fees. Co. Treas. to ret. to Local Treas. arr. taxes on occupied lands. Last Day for Co. Co. to equalize Asses. Rolls. Long Vacation begins.

6. SUN... *4th Sunday after Trinity.*

7. Mon.... Co. Court Term begins.
Heir and Devisee Sittings begin.

10. Thurs.. Last day for Master and Reg. in Chy., Clks. and Dep. Clks. Crown, to pay over fees to Provincial Treasurer.

12. Sat.... County Court Term ends.

13. SUN... *5th Sunday after Trinity.*

15. Tues... *St. Swithin.* Co. Judge to comp. Appeals for Court of Revision.

20. SUN... *6th Sunday after Trinity.*

22. Tues... Heir and Devisee Sittings end.

27. SUN... *7th Sunday after Trinity.*

CONTENTS.

EDITORIALS:

County Judges' Criminal Courts..... 197
Practice in Probate Courts..... 197
Mr. Edwin James..... 197
Surgical Definitions..... 197
Insolvent Act—Decision in Nova Scotia..... 198
Delegation of Judicial Functions..... 198
The Bar of England..... 198
The Chief Justice of England and Mr. Cushing.. 198
The Wills Act, 1873..... 199
Travelling by Rail..... 202

CANADA REPORTS:

Ontario:

Notes of Recent Decisions:

Court of Error and Appeal..... 211
Common Law Chambers..... 211
Chancery Chambers..... 212

ENGLISH REPORTS:

Digest of English Law Reports..... 213

REVIEWS:

High on Injunctions..... 223
The Law Magazine and Review..... 223
American Law Review..... 223

AUTUMN ASSIZES, 1873..... 223

CHANCERY AUTUMN CIRCUITS, 1873..... 223

LAW SOCIETY OF UPPER CANADA..... 224

THE
Canada Law Journal.

Toronto, July, 1873.

The *Law Times* notes the statistics we recently published with reference to the results of trial by judge and by jury upon the number of convictions, and concludes by thinking it somewhat remarkable, after looking at the figures, that offenders ever elect to be tried by the Judge.

A question which has given rise to much discussion in the purliens of Doctors' Commons, has recently been for the first time expressly decided by Vice-Chancellor Little, of the Lancaster Chancery Court. He held with some hesitation that where a testator appoints his wife to be his executrix during her widowhood, and she dies without having married again, that her executor represents the testator: *Mayers* v. *Langton*, 17 Sol. Jour. 537.

Mr. Edwin James, who has been refused re-admitttance to the Bar of England, is about to be received into the ranks of the attorneys, unless the examiners refuse to examine him, when he must apply to the Court of Queen's Bench to compel them to do so. The *Law Times* says a gross indignity has been perpetrated upon the profession by the solicitor to whom Mr. James has been articled, by the insertion of the name of the latter, still an articled clerk, in the corner of the card of the solicitor.

On a trial for an assault, a surgeon, in giving his evidence, informed the Court, that on examining the prosecutor, he found him suffering "from a severe contusion of the integuments under the left orbit, with a great extravasation of blood, and ecchymosis in the surrounding cellu-

bas," and that there was also "considerable abrasion of the cuticle." The Judge asked, "You mean, I suppose, that the man had a black eye." The witness answered "Yes," whereupon his lordship remarked, "they why not say so at once?"

Our valued correspondent at Halifax has sent us a judgment delivered by the Supreme Court of Nova Scotia, on the "Insolvent Act of 1869." The point is doubtless of great importance in that Province, where judgments can be registered so as to bind lands in the same way as *was* the law in this Province. But owing to the very proper repeal of that law by our Legislature, the decision is not of importance here. The main question raised in the case was as to the right of a *bonâ fide* judgment creditor, as against an assignee in insolvency, where the judgment was duly registered in the proper office within thirty days of the defendant's assignment under the Insolvent Act. The Court held that as the judgment was duly registered the Act did not destroy the preference obtained by the judgment creditor.

From the *Irish Law Times*, we observe that the Lord Justice Christian has been from the Bench agitating the same question as that which was some time ago discussed in the columns of the Toronto papers touching the scope of the proper duties of the Chief Clerks in Chancery, who hold a position somewhat analogous to that occupied by the Judges' Secretary. The Lord Justice in rather unmeasured terms, but with true Irish *verve*, has denounced the practice of the judges delegating any portion of their judicial work to inferior officials. The Lord Justice's strictures, which have created immense and not altogether satisfactory excitement in the profession, will no doubt work a cure of the evil complained of. As will be remembered the difficulty in this Province was overcome by the passing of an act of Parliament changing the name of "Secretary" to that of "Referee in Chambers," and defining the duties, which as *quasi* judge in Chambers he might properly undertake.

The *Saturday Review* has recently indulged in some very uncomplimentary remarks on the Bar in England. It says that there are few really good lawyers now at the Bar, and still fewer good speakers, and that the great run of lawyers are content to scramble on with mouthsful of law picked up from day to day, as occasion requires, trusting to text books and luck for getting up the necessary information, when a call happens to be made for it. The common oratory of the Bar is said to be a deplorable exhibition, reaching a high average standard when it is just articulate, and does not too violently outrage the rudimentary laws of grammar. Of the judges even, it is said that there is hardly one, who, to say nothing of elevated thoughts and literary subtlety, can even turn a decent sentence. English writers *ought* to know something of English people, but it sometimes happens that they know as little about them as they do about affairs in the Colonies; we shall therefore charitably suppose that the writer in the "Reviler" was suffering from dyspepsia, or is one of the many thousand "briefless," as yet unknown to, or unappreciated by the lower branch of the profession, the employers and paymasters of those above them.

We recommend to the notice of our readers the scathing remarks in a recent number of the *Canadian Monthly* touching the scandalous observations of Mr. Caleb Cushing on Sir Alexander Cockburn, who dissented from the judgment of his colleagues in the Geneva arbitration. It is evidently written by one who knows our cousins well, and—appreciates them.

THE WILLS ACT, 1873.*

(CONTINUED.)

The statute next prescribes, by section 7, the mode in which a will shall be made. The most important feature of this section is the abolition of the distinction, which has heretofore existed, as to the ceremonies of execution between wills of real and personal estate.

The forms necessary to the due execution of wills of real estate were prescribed by the Statute of Frauds, which required that the will should be in writing and be signed by the testator, or by some one in his presence and by his express direction, and should be attested and subscribed in the presence of the devisor by three or four credible witnesses. The provisions of the Statute of Frauds which relate to the execution of wills are still in force in this Province, though they have been modified by 4 Wm. 4, c. 1, s. 51, (Con. Stat. U. C. c. 82, s. 13), which provides that "any will affecting land executed after the sixth day of March, one thousand eight hundred and thirty-four, in the presence of, and attested by, two or more witnesses, shall have the same validity and effect as if executed in the presence of, and attested by three witnesses; and it shall be sufficient if such witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator." The reader can make himself fully acquainted with the effect of this section and its bearing on the old statute by a perusal of the judgment of the Court in the case of *Crawford* v. *Curragh*, 15 U. C. C. P. 55, in which the whole subject is reviewed. The provisions of the Statutes of Frauds, and of 4 Wm. 4, c. 1, which relate to wills, are repealed by the new Act.

The present state of the law of this Province, regarding wills of personal estate, may be described in the words used by the Real Property Commissioners regarding the state of the law in England, prior to the passing of the Act 1 Vict., c. 26. In their fourth report on the law of real property, at p. 15, the Commissioners observe that: "The informality of wills of personal estate has often been the subject of complaint. The question, whether a paper is or is not testamentary, has been the occasion of a large proportion of the most vexatious and expensive law suits which have arisen on wills." And again at p. 7, "Wills of personal estate in writing might be made in any form and without any solemnity. It was not necessary that even the name of the testator should appear; any scrap of paper or memorandum in ink or in pencil, mentioning an intended disposition of his property, was admitted as a will, and would be valid although written by another person, and not read over to the testator, or even seen by him, if proved to have been made in his lifetime according to his instructions. If a will was imperfect, and it appeared upon the face of it that something more was intended to be done before it was finished, yet it was valid so far as it appeared to be complete, if it was proved that the testator's intention was arrested by sickness or death."

In *Re Nelson, McLennan* v. *Wishart*, 14 Grant 200, a fair specimen occurs of the extraordinary documents which the Courts admit to probate as wills of personalty. On one scrap of paper is written, "I leave the whof (*sic*) of my property to William Brown, Townhead, Arbuthnot by Fordoun, Scotland, $2,000, William Brown, Townhead, Arbuthnot by Fordoun, Scotland." On another scrap is written, "I give Peter Crann $500 for himself." These papers were admitted to probate as constituting the will of one Alexander Nel-

* A mistake occurred in the last paragraph of this article at p. 170, owing to the transposition of a line. The words "also *Davidson* v. *Sage*, not yet reported," should follow the reference to *Wright* v. *Garden* in the line but one previous. —Eds. L. J.

son. This instance is an ample justification of the strong language used by the Commissioners regarding wills of personal estate.

The new Act requires that *all* wills shall be executed in the same manner, and prescribes particularly the mode of execution. The latter part of section 7 has been adopted from the English statute 15 & 16 Vict., c. 24, which was passed to provide for many cases in which wills had been held to have been imperfectly executed under 1 Vict., c. 26., sec. 9.

It will be observed that the new Act provides that the witnesses must be *present at the same time*, and in this respect it differs from the Statute of Frauds, under which it was held that the testator might acknowledge his signature to the witnesses singly, and at different times. (See *Crawford* v. *Curragh*, *ante*.)

Section 9 provides that a soldier in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act. But for this section, the provision contained in section 7 that "no will shall be valid unless it shall be in writing," would have entirely abolished nuncupative wills. This class of wills was placed under various restrictions by the Statute of Frauds, but the provisions of that act in this respect were disapproved of by the Real Property Commissioners, and by the 9th section of 1 Vict., c. 26, to which the 7th section of our new act corresponds, nuncupative wills were abolished in England, with the exception of the wills of soldiers and mariners, who were empowered by the 11th section to dispose of their personal estate as they might have done before the making of the Act.

In this Province, by Statute 33 Geo. 3, c. 8, the making of nuncupative wills was subjected to such restrictions as must have practically abolished them; and by Con. Stat., U. C., cap. 16, s. 83, it is provided that "no nuncupative will, made after this Act comes in force, shall be good; provided that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate in such manner as he may now do according to the laws of England." It will thus appear that the new Act effects no change in the law respecting nuncupative wills.

Appointments by will are, by the 8th section of the Act, required to be executed in the same manner as a will; and such an execution of the appointment is made sufficient, though provision may have been made by the instrument creating the power, that other forms or solemnities than those prescribed by the Act shall be used in exercising the power.

Sections 11, 12, 13 and 14, are a substantial re-enactment of the provisions of 25 Geo. 2, c. 6, which is repealed by the new Act. That statute was passed to remedy the inconvenience resulting from the construction put by the Courts upon the words "credible witnesses" contained in the 5th section of the Statute of Frauds. It was early held that any person, who derived any benefit under a will of real estate, should be considered an incompetent witness on the ground of interest; and the statute 25 Geo. 2, c. 6, by depriving a witness to a will (except in a few cases), of any provision made by the will in his favour, preserved the witness' competency.

The Act was held, however, not to extend to a case where a witness takes an interest consequentially and not directly: *Ryan* v. *Devereux*, 26 U. C. Q. B. 100, and cases there cited. Thus, where the will gave a small legacy to the wife of one of the witnesses, and thus created an interest which rendered the husband technically incredible, it was held that the statute did not apply, and that the husband was therefore incompetent to be a witness to the will: *Ryan* v. *Devereux*,

sup. This defect in the old statute is cured by the new Act, which renders void a devise or legacy to the wife or husband of the attesting witness.

We now approach the important subject of the revocation of wills. The provisions of the statute on this subject are not absolutely new to our law; for, as before observed, the Act, 32 Vict., c. 8, contains the chief provisions of the English statute, 1 Vict., c. 26, regarding revocation. In one important particular, however, it is conceived that our statute, 32 Vict., c. 8, is defective. It contains no provision regarding obliterations, interlineations, or other alterations which form the subject of the 21st section of the English Act. The omission of such a provision would, it seems, lead to the unfortunate result that whilst a will cannot be totally revoked except by the means provided by the Act, it may be partially revoked by obliteration in the same manner as before the Act was passed. Obliteration was permitted by the Statute of Frauds as a means of either total or partial revocation of a will of real estate. The 20th section of the English Act, 1 Vict., c. 26, from which the 5th section of 32 Vict., c. 8, was adopted, was held in England to apply to total and not to partial revocation, and the words "otherwise destroying," which are substituted in that section for the words "cancelling" and "obliterating," which occur in the Statute of Frauds, were held not to comprise cancellation or obliteration. (See 1 Williams Exors. 139, and cases cited in notes.) Assuming, as we must, that the same construction would be placed by our courts on the words of the 5th section of 32 Vict., c. 8, it follows that that section does not apply to partial revocations. Hence it must appear that though a will cannot be wholly revoked except in the manner prescribed by 32 Vict., c. 8, it may be partially revoked by obliteration to the same extent as before the passing of that Act. As the new Act applies only to wills *made* after the 31st December, 1873, the anomaly referred to will continue after the new Act comes into force.

The new statute provides that marriage *alone* shall be a revocation of a will made before marriage. Under the old law marriage was always a revocation of the will of a woman, but marriage *and the birth of issue* were necessary to constitute a revocation of the will of a man made before marriage. And, in certain cases, where provision was made by a man for his issue, by settlement or otherwise, even the concurrence of the two events of marriage and the birth of issue did not operate as a revocation of his will. The wording of the new statute, however, respecting the revoking effect of marriage is express and positive. A will made in exercise of a power is excepted, under certain circumstances mentioned in the Act, from the operation of marriage as a means of revocation.

Marriage is the only alteration in circumstances to which a revoking effect is given, section 16 providing that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Reference has been made to the words "otherwise destroying," which were substituted in the 20th section of the English Act for the words "cancelling or obliterating," contained in the Statute of Frauds. These words also occur in the 17th section of the new Act. They have the effect, as has been before remarked, of depriving "cancellation" and "obliteration" of the efficacy as a means of *total* revocation which they formerly possessed. The destruction implied in the words "otherwise destroying" is a destruction effecting the same physical results as burning or tearing. (See remarks of the Court in *Stephens* v. *Taprell*, 2 Curt. 458), not a mere cancel-

lation or obliteration of the contents of the will.

Obliterations, interlineations, and other alterations are provided for by the 18th section of the Act. Any alteration in the will must be executed in the same manner as is required by the Act for the execution of a will. If, however, words should be so obliterated that they cannot be ascertained by an inspection of the instrument, the will must be read with these words omitted, as the Courts refuse to admit extrinsic evidence to ascertain what the words were: 1 Williams Exors. 139, and cases cited in note "*h*." The practical result of course is that a will *may* be partially revoked by an unattested obliteration, if the words are so obliterated as to be incapable of being ascertained.

The revival of a will, it will be observed, can, under the Act, be effected only by a re-execution of the will, or by a codicil executed in the same manner as a will is required to be executed, and showing an intention to revive.

Under the present law a will of real estate which has been revoked can only be revived by re-execution: 1 Powell on Devises 609, 3rd Ed. But a revoked will of personal estate may be revived by parol: 1 Williams Exors. 199, or by any act of the testator showing that he desired to revive and adopt the will.

The 20th section of the new Act deals with the anomaly referred to by V. C. Mowat in the case of *Loughead* v. *Knott* already alluded to. It is in fact a re-enactment of the 2nd section of 32 Vict., c. 8, which was passed shortly after that case was decided.

The old law is described by Sir W. Page Wood (*Grant* v. *Bridger*, L. R. 3 Eq. 352), as "that law now happily obsolete (in England), by which, with a sort of remorseless logic, any person who had once made a will and afterwards disposed of his interest for any purpose whatever, even although he might get back the identical estate he parted with, was held to have revoked his will, and equity could not give any assistance except in the single case of a mortgage. * * * * This mode of entirely defeating a testator's intention by the magic of a conveyance, as I have said, is a logical application of the doctrine that a will is an appointment of real estate." That such a principle of law should have remained so long unaltered in this Province may probably be attributed to the fact that no case had occurred in our Courts before *Loughead* v. *Knott*, in which its monstrous features were obtruded upon the notice of the public.

(To be continued.)

TRAVELLING BY RAIL.

(CONCLUDED.)

We now pass from fatal accidents to those of a less disastrous nature. An infant, if injured by a railway accident, may lay the foundation of a fortune by recovering damages against the company, even although his finances have not been lowered by paying for his ticket when he should have done so. A company was bound to carry infants under three years of age free of charge, and children between three and twelve years at half-fare, (surely that by-law or act must have been drafted, framed and passed by fathers of large families); the plaintiff's mother, carrying in her arms the plaintiff, a juvenile of three years and two months, purchased a ticket for herself but did not take one for her child; no question as to the age of the plaintiff being asked by the officials, and the mother having no desire to deceive or defraud the company. *En route*, an accident occurred, through the negligence of the company, and the plaintiff was injured; *held*, that the infant was entitled to recover against the company for the injury he had received.

The contract the mother made by the purchase of the ticket was, that both she herself and the plaintiff should be carried safely. If that contract had been entered into under some misrepresentation on the part of the mother, she might have been liable for the fare which ought to have been paid for the child, or for any penalty to which she might be subject by any enactment or by-law made under statutory powers. But her default did not alter the position of the company; and the contract being to carry the mother and child, and through the negligence of the company, the plaintiff being injured, the verdict giving him damages was right. The company entering into it under a mistake as to the age of the child did not make it less a contract: *Austin* v. *Great Western Ry. Co.*, L. R. 2 Q. B. 442.

It was held on demurrer, that a sufficient cause of action was disclosed when the declaration alleged, that by reason of the accident, the plaintiff became sick, sore and disordered, and so continued from thence hitherto, and thereby, also, by reason of the terror and alarm occasioned to her of the said collision, and of such sickness caused thereby, she had a premature labor and bore a still-born child: *Fitzpatrick* v. *Great Western Ry. Co.*, 12 U. C. Q. B. 465.

Where the conduct of the passenger in any way contributed to the accident, he is estopped from bringing an action against the company; for instance, if he is injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, he will have no claim for the injury, provided room inside of such passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time (sec. 20, sub-sec. 13, Railway Act, 1868.) The plaintiff, who had an ordinary passenger ticket, went into the express company's compartment of the baggage car, and while there, the train, (which was stationary,) owing to the negligence of the defendants' servants was run into by an engine coming up behind it, and the plaintiff's arm was broken. It appeared that although the compartment was not intended for passengers, still they frequently went in there to smoke, and that the conductor had passed through it twice while he was there without making any objection to the plaintiff's presence. No person in the passenger cars was seriously hurt. A notice that passengers were not to ride upon the baggage car was usually put upon the inside of each door of the passenger car, and on the door of the baggage car, but it was not distinctly shewn that it was there on the day of the accident. The jury found that the plaintiff was wrongfully in the car, but that as he was not told where to go when he bought his ticket, nor had the conductor ordered him out, he was not to blame. The Court held that assuming the plaintiff was aware of the notices and yet went into the baggage car, the defendants were not thereby excused under all the circumstances; and that the jury were warranted in finding that the plaintiff did not so contribute to the accident as to prevent him recovering, the collision having resulted entirely from the defendants' negligence. *Held*, also, that sub-sec. 13 of section 20 of the Railway Act did not apply. The jury gave $2000 damages; but the evidence as to the injury being very loose (no medical witness having been called), the Court granted a new trial on payment of costs: *Watson* v. *The Northern Railway Co. of Can.*, 24 U. C. Q. B. 98.

In *Murray* v. *Metropolitan District R. W. Co.*, 27 L.T. N.S. 762, the plaintiff occupied a seat next to a window, and allowed his left hand to rest on the ledge of the window, which was up when he

entered the car. As the train approached a station the break was suddenly put on, and the window falling down from the vibration, inflicted a serious injury on the plaintiff's finger. The plaintiff was nonsuited on this evidence, the Court holding that without positive proof of a defective construction of the window, the mere falling of it would not make a *prima facie* case of negligence against the company. But this case is no authority for saying that passenger carriers are not bound to provide windows with good fastenings for the comfort of the passengers. A railway company is not bound to put bars across its carriage windows—as careful matrons do over their nursery panes—to prevent travellers from putting their limbs, upper or lower, out: and it is negligence for a passenger to allow his arm to project beyond the inside of the window, and if it is injured while in that position he cannot recover damages from the company: *Indianapolis & Cincinnati R. W. Co.* v. *Rutherford*, (referred to in 4 U.C. L.J. N.S. 242.)

While the plaintiff was looking out of a window and pressing against a bar crossing it, the door flew open and he flew out, and was injured. There was no evidence as to whether the door was totally unfastened or only secured imperfectly; the jury having given the plaintiff a verdict, a rule obtained to enter a non-suit was discharged: *Gee* v. *Metropolitan R. W. Co.*, Ex. Ch., Weekly Notes, No. 7, 1873.

On the question of the liability of a company for accidents arising from the negligence of others, it has been held that where a passenger on a train has been injured by the misconduct of a fellow traveller, the company is liable only in case there was negligence in its officers not making proper efforts to prevent the injury. Railway companies are bound to furnish men enough for the ordinary demands of transportation, but not a police force adequate to extraordinary emergencies, as to quell mobs by the wayside. It is negligence in a conductor to admit voluntarily improper persons, or undue numbers, into a car: *Pittsburgh, Fort Wayne &c. R. W. Co.* v. *Hinds*, 7 Am. Law Reg. 14. A girder, which was being placed across the retaining wall of the railway, through the negligence of the workmen employed by a contractor and unconnected with the defendants, fell upon and injured the plaintiff while he was travelling by the defendants' railway. It was proved that the work in question was extremely dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice when such work was being done for the company to place a man to signal to the work people the approach of a train, and that this was not done on the occasion in question: but there was no proof that the company's servants knew that the girder was being removed at the time the train was passing, or of the means used by the contractor to move it. *Held*, (reversing the decision of the Court of Common Pleas,) that as a fact the defendants were not guilty of negligence, although the evidence of negligence was such that it should not have been withdrawn from the jury: *Daniel* v. *Metropolitan R. W. Co.*, L.R. 3 C.P. 591, (Ex. Ch.)

Evidence of the number of olive branches round about the family table of the injured one, or of his habits of industry, is not admissible in an action for damages, unless special damage is averred. In an action of this kind evidence that the conductor was intemperate, or otherwise incompetent, is admissible to raise a presumption of negligence. And it is no justification for the employment of an incompetent servant that competent ones are difficult to obtain: *Pennsylvania R. W. Co.* v. *Brooks*, Am. Law Reg. 524.

The first clause of the Mosaic Law

known as the fourth commandment, and the various acts thereon founded, occasionally step in to the detriment of travellers: as where the plaintiff received an injury by being thrown from one of the defendant's horse cars, while on the way to visit a friend, it was held that the plaintiff was travelling in violation of the Lord's Day Act, and could not recover: *Stanton* v. *Metropolitan R. W. Co.*, (referred to in 4 U.C. L.J. N.S. 170.) In many of the neighbouring States travelling is forbidden on Sundays.

Railway companies should bring their trains to a halt at places convenient for passengers to alight. Bringing a car to a stand still at a spot at which it is unsafe for a passenger to get out, under circumstances which warrant the traveller in believing that it is intended he shall alight, and that he may do so in safety, without giving him any warning of his danger, amounts to negligence on the part of the company, for which an action may be maintained if the plaintiff has not in any way contributed towards the accident: *Cockle* v. *London & S. E. R. W. Co.*, L. R. 7 C.P. 721. (Ex. Ch.) Here the carriage in which the plaintiff was, remained some feet beyond the platform where the train stopped, and owing to the insufficiency of the light, the plaintiff in alighting imagined she was stepping upon the platform, and thus fell. In this, *Praeger* v. *Bristol & Exeter R. W. Co.* 24 L. T. N. S. 105, which was a similar case, was followed. In giving judgment, however, in Praeger's case Cockburn, C. J., said "I adopt most readily the formula which has been suggested as applicable to these cases, viz: that the company are bound to use reasonable care in providing accommodation for passengers, and that the passengers are also bound to use reasonable care in availing themselves of the accommodation provided for them. Therefore I agree that a passenger is bound to use reasonable care in alighting on the platform, or elsewhere, when it becomes necessary for him to alight; I agree that if it be daylight, a man being bound to use his eyesight, if the passenger sees that the carriage is not in the ordinary position with reference to the platform, he must not complain if there being no actual danger, he has to use a little more caution than usual in getting out."

Where the train overshot the platform so that the car in which the plaintiff was sitting stood opposite to the parapet of a bridge, the top of which in the dusk looked like the platform; the porters having called out the name of the place, the plaintiff getting out on the parapet in the *bonâ fide* belief that he was stepping on the platform, fell over and was injured, but recovered from the company: Bovill, C. J., held that on this occasion there was a clear invitation to alight at a dangerous place: the plaintiff, too, was misled by the appearance of the parapet into thinking it was the platform, and this distinguished the case from *Bridges* v. *North London R. W. Co*, L. R. 6 Q. B. 377. *Whitaker* v. *Manchester and S. R. W.*, L. R. 5 C. P. 464. The Company was held liable where, in the dark, a passenger in alighting fell into a culvert over which the car had stopped: *Col. & Ind. C. R. W. Co.* v. *Farrell*, 31 Ind. 408. In *Foy and his wife* v. *London B. & S. C. R. W. Co.* 18 C. B. N. S. 225, owing to the length of the train, there was not room for all the cars to be drawn up at the platform, and some of the passengers were desired to get out upon the line beyond it. The distance from the carriage to the ground was only three feet: Mrs. Foy, instead of sensibly availing herself of the two steps of the carriage, with the aid of Mr. C. jumped from the first step to the ground, and came down with such a thud that she injured her spine. The jury found that the company were guilty of negligence in not providing reasonable means of alighting, and that the lady had

not contributed to the accident, and they gave her £500 to pay her doctor's bills: and the court considering the finding warranted, declined to interfere with the amount of damages.

Bovill, Q. C., urged that if the lady, instead of jumping as she did, had turned herself round and availed herself of the assistance of both steps and of the handles of the carriage, the accident would not have happened; but Williams, J., said severely that "in the present fashion of female attire, the mode of descent suggested by the learned counsel would be scarcely decent." This judgment was given in 1865, and as fashions change, one can hardly decide what a lady might or should do in this present year of grace. Where, however, Mr. and Mrs. Siner arrived in daylight at Rhyl station and the carriage in which they were overshot the platform; the passengers were neither told to keep their seats nor get out, nor was there any offer made to back up, nor did the train again move until it started on its onward journey to Bangor. After exhausting his stock of patience, the husband, following the example of his fellow travellers, alighted without asking the company's servants to back the train to the platform or holding any communication with them whatever. The wife then, standing on the iron steps of the carriage, grasped both her husband's hands and jumped down, straining her knee in the act. There was a foot-board between the iron steps and the ground which she might have used but did not. There was no evidence of any carelessness or awkwardness except such as might be inferred from these facts. In an action brought against the company for this injury, the court held (Kelly, C. B., diss.) that there was no evidence of negligence in the defendants, and that the accident was entirely the result of the woman's own acts in awkwardly and carelessly jumping. The case of *Foy* v. *London, &c.*, *ante* was distinguished, as there an express invitation to alight was given. But the Chief Baron thought the stopping of the train at the station without any notice to the passengers not to get out, was an invitation to them to do so: that the descent at that place was dangerous, but not so clearly dangerous that the plaintiff might not properly encounter the risk; and that the company having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably: *Siner* v. *Great Western R. W. Co.*, L. R. 3 Ex. 150.

So where a short-sighted gentleman, who well knew the station, got out of the train while the carriage in which he had been sitting was still in a tunnel, and in making his way to the platform, stumbled over some rubbish and fell, breaking his leg and otherwise injuring himself, so that he shortly died from the effects; there being no evidence that the train had come to a final stand-still, or that the company had designed the passengers to alight then, it was held that the personal representative of the deceased could not recover against the company: *Bridges* v. *North London Ry. Co.*, L. R. 6 Q. B. 377. The fact that the deceased was short-sighted imposed no additional obligation on the defendants. In one case the platform was curved back from the line so as to leave a space of two feet between the carriage and the platform; the train having stopped, and the name of the place having been called out, one Praeger, a passenger, stepped forth and fell between, injuring himself thereby. A good deal of evidence was given as to the circumstances of the accident and the knowledge of the plaintiff of the peculiarities of the station. The jury gave the plaintiff a verdict, but the Court made absolute a rule to enter a nonsuit

on the ground that the conduct of P. amounted to contributory negligence: *Praeger* v. *Bristol & Exeter Ry. Co.*, L. R. 5 C. P. 460 *n.* 1; see also, *Plant* v. *Midland Ry. Co.*, 21 L. T. N. S. 836 and *Harold* v. *Great Western Ry. Co.*, 14 L. T. N. S. 440.

In Bridges' case it was unanimously held by the whole Court, that the calling out the name of a station is not in itself an intimation to the passengers to alight; whether it is so or not must depend on the circumstances of each particular case; as Willes, J., said, nobody who travels by rail who has a head on his shoulders would ever say that calling out the name was an invitation. Cleasby, B., considered that in reality the stopping of the train at the station is the invitation to alight. In *Whitaker* v. *Manchester &c. Co.*, *ante*, Bovill, C. J., said that whether calling out was a request to alight or not, was a question for the jury.

If a place where a passenger is required to alight is in fact dangerous, it is his duty to request the train to be put in the proper place; and this is a request which no station-master would venture to refuse, knowing the risk he would incur if an accident happened through his refusal. If the defendants will not place the train properly, the plaintiff should stay in the carriage. So said the Judges in *Siner* v. *Great Western Ry. Co.*, L.R. 3 Ex. 150; but we can well imagine the surprised look—tinged strongly with scorn—of a conductor upon one of our Canadian railways, were he asked to move his train forwards or backwards for the convenience of his living freight.

Companies should allow their passengers reasonable time for leaving the cars when they arrive at their journey's end; if they do not, and any one, young or old, is injured, the company will be liable: *Railroad Co.* v. *Baddeley*, 54 Ill. 19; see also the remarks of Willes, J., in *Bridges* v. *N. London Ry. Co.*, *ante*. But if a person dilly-dallies until the train again moves on, and then while hurriedly alighting is injured, fatally or otherwise, no action will lie against the company: *Ill. Central Ry. Co.*, v. *Slatton*, 54 Ill. 133. Sick and infirm travellers, and those unable to take care of themselves, should provide themselves with proper assistants while journeying by cars; and if one from ill-health requires longer time than usual for alighting he should give the conductor timely warning: *New Orleans Ry. Co.*, v. *Stratham*, 42 Miss. 607, see also *Bridges* v. *North London, &c.*, *ante*.

The stations of the Bristol and Exeter Railway Company and two other companies adjoin one another at Bristol, and are open to one another, and the passengers of each company are in the habit of passing directly from the one to the other—the whole area being used as common ground by the travellers on all three companies. While the plaintiff was on the defendants' part of the platform on the way from the terminus of one company to that of the other, a porter of the defendants' who was driving a truck laden with luggage, let a portmanteau fall off and injure the plaintiff; the Court held, that the negligence complained of being an act of misfeasance by the servant of the defendants in the course of his employment, the maxim *respondeat superior* applied and the defendants were liable; but they doubted if defendants would have been responsible supposing that the plaintiff had injured himself from the state and condition of the platform: *Tebbutt* v. *Bristol & Ex. Ry. Co.*, L. R. 6 Q.B. 73.

The importance of the matter, and the number of the cases bearing thereon, must be an excuse for again referring to railway stations. In a late American case, Dillon, C. J., laid down the following rule as applicable to all cases of injury occurring about stations and in entering cars:

"Railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do and would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." *McDonald and wife* v. *Chicago & N. W. R. Co.*, 26 Iowa 124. Where the plaintiff arrived at the station less than two minutes before the time of departure of the train, and while running along the line in a place where he should not have gone, in order to reach the train, which was some distance ahead, he stumbled over a switch handle, fell on his elbow and was considerably hurt: the jury found that the injury was occasioned by the negligence and want of proper care by the defendants, and gave him £20, and the court sustained the verdict: *Martin* v. *Great Northern R. W. Co.*, 16 C.B. 179. In *Burgess* v. *Great Western R. W.*, 32 L.T. 76, the plaintiff, a passenger on defendants' train, while waiting at a station, like many a miserable mortal has to, for the purpose of changing cars, desired some stimulants for the inner man. There being no refreshment room he asked the porter the way to a public house, and that official showed him the road to one on the opposite side of the highway which passed the station. While enjoying himself to the full the bell rang out sharp and clear, and the plaintiff instead of returning the way he came, took a short cut over some unfenced ground towards the engine, the light of which he mistook for the station lamps. On his way he fell into a three foot deep hole, and was injured. A verdict was given for the plaintiff, on the ground that a company is bound so to fence its station that the public will not be misled by seeing a place unfenced into injuring themselves by passing that way, it being the shortest road to the station. A company was held responsible for damages arising to the plaintiff who fell over some hampers which had been put out of the train, such mischief not being attributable to the plaintiff's own negligence: *Nicholson* v. *Lancaster & York R. W.*, 3 Hurl. & C. 534.

In *Longmore* v. *Great Western R.W.*, 19 C.B. N.S. 183, it was held that the company were liable for the death of a passenger through the faulty construction of a bridge, erected by them for the more convenient access of passengers to the station, although there was a safe one about 100 yards further round, which the deceased might have used. It would seem, however, that though the access to a station may be, from its peculiar position, inconvenient or even dangerous, yet a passenger having full knowledge of its being so and still choosing to use it, may not have any ground of complaint if he be injured, *volenti non fit injuria*: Cleasby, J., in *Bridges* v. *N. London, &c.*

The decision in *Shepherd* v. *Midland R. W. Co.*, 20 W.R. 705, holding that a plaintiff might recover when he had while waiting for the train, slipped on a strip of ice and falling dislocated his shoulder, as he was tramping up and down the platform, would be well nigh disastrous to companies if applied strictly to the roads in our rigorous northern climate. A would-be passenger, while on the platform, got frightened by an engine which appeared to be making straight for him—a switch having been negligently misplaced—he ran to avoid the charge of the iron horse, and in doing so was injured, and the company was by the Massachusetts courts held liable: *Caswell* v. *Boston & Worcester Q. W.*, 98 Mass. But if a traveller voluntarily steps off the side of the platform, instead of going to the proper steps, he cannot recover for injuries there sustained: *Forsyth* v. *Boston, &c.*, 103 Mass. 510.

Hannan, J., in *Siner* v. *Great Western*, *ante*, said, "I think juries take an exaggerated view of the duties of railway companies. The companies have done so much for the comfort and convenience of travellers, that it is now made the subject of complaint if the highest degree of luxurious care is not attained in all their arrangements." These remarks appear exceedingly appropriate and reasonable when one considers that in *McDonald et ux.* v. *Chicago, &c.*, 26 Iowa, 124, it was held, that the female plaintiff, who found the passenger room at the station unfit for occupation, by reason of her olfactory nerves and visual organs being offended by tobacco smoke and other impurities, and attempted to enter the cars which had not yet been drawn up to the platform that she might avoid these disagreeables, and was injured by the giving away of the steps of the platform, was entitled to recover. "It is the duty of railway passenger carriers to provide comfortable rooms for the accommodation of passengers while waiting at stations, and to enforce such regulations in regard to smoking therein, as to enable passengers to occupy them in reasonable comfort." The learned judge must have held views somewhat similar to those entertained by the royal leader of the anti-tobacconists, James I. But where in a crowd the plaintiff was driven against a portable weighing machine on the platform of the defendants' station, and catching his foot in it, fell and hurt himself,—the foot of the machine projected some six inches above the level of the platform, and it was unfenced, but it had stood there some five years without accident to any person passing to or from the train; *held*, that there was no evidence of negligence to go to the jury, the machine being where it might have been seen, and the accident not being shewn to be one which could have been reasonably anticipated: *Corman* v. *Eastern Counties Ry.*, 4 H & N. 781. If an accident had happened from the platform being so constructed as to be insufficient to carry the weight of the persons who might come upon it in great numbers on a particular day, that no doubt would be evidence of negligence on the part of the company.

Passengers have the same rights to safe ingress, egress and regress and proper station accommodation and platforms at intermediate places where the train may chance to stop for refreshments, as they have at the termini of the line: *McDonald* v. *Chicago, &c.*, *ante*. But at stations where the train stops merely for the purposes of the railway, and people are not expected to get out or in, the rights of passengers, and the liability of the company are greatly curtailed: *Frost* v. *G. T. R.* 10 Allen 387.

In *Murchamp* v. *Lancaster & Preston Ry. Co.*, 8 M. & W. 421, the counsel for defendants, to establish the point that the company was not liable for goods lost beyond the limits of their line, as a *reductio ad absurdum* put the case of a passenger injured on a line of railway beyond that to which he was originally booked,—but Rolfe, B., could not see it, and considered that if he took his place at Euston Square, and paid to be carried to York, he would, if injured, have his remedy against the party who contracted to carry him to York. And this dictum of the learned Baron's has been fully sustained by a host of decisions. *The Great Western Ry.* v. *Blake*, 7 H. & N. 987, (Ex. Ch.,) decides that where a railway company contracts to carry a passenger from one terminus to another, and on the journey the train has to pass over the line of another railway company, the company issuing the ticket incurs the same responsibility as that other company, over whose line the train runs and by whose default the accident happens, would incur if the contract to carry had been entered into by them.

The company issuing the ticket is liable for the negligence of the servants of any other company over whose line the passenger has to pass to reach his journey's end; the contract with the passenger being the same whether the journey be entirely over the line of the first company, or partly over the line of another company, and whether the passage over the other line be under an agreement to share profits or simply under running powers, viz.,—not only that they will not be themselves guilty of any negligence, but that due care will be used in carrying the passengers from one end of the journey to the other, so far as is within the compass of railway management. *Thomas* v. *Rhymney R. W. Co.*, L. R. 6 Q. B. 266 (Ex. Ch.,) and *John* v. *Bacon*, L. R. 5 C. P. 437.

The train, on which was one Birkett—who had bought from the defendants a ticket to Carlisle—in going into a station had to pass over the line of another road, on which was a self-acting switch: in consequence of the points of the switch being turned the wrong way the train collided with some coal trucks, and B. came to an untimely end. The Court held that the judge had rightly left it to the jury to say whether there was negligence on the part of the defendants, and the jury having found that there was, that the defendants were liable to Birkett's personal representatives: *Birkett* v. *Whitehaven Junction R. W. Co.* 4 H. & N. 730. If a switch by which another road connects with that of the defendants—although it is provided by, and attended to by, the other road—is so carelessly managed that an injury is sustained by a passenger upon the cars of the defendants, the defendants are responsible: *McElroy* v. *Nassau & Lowell R. W.* 4 Cush. Mass. 400, and see *Nassau* v. *same defendants*, 9 Foster 1. Yet in *Sprague* v. *Smith*, 9 Verm. 421, it was held that where a carrier of passengers rightfully runs his cars upon the line of another company, over which he has no control or power, he will not be liable for any injury caused, without any fault of his, through the negligence or misconduct of the servants of the other line: see also *Parker* v. *Rensselaer & Saratoga R. W.* 16 Barbour 315. Fortunately, though English and Canadian Courts are desirous of treating American decisions with great respect, still their authority here and in the father land mainly depends upon the reasons on which they are founded.

In *Wright* v. *Midland R. W.*, Weekly Notes, 1873, No. 8, the plaintiff was in defendants' train: over a portion of their line the North Western Company have running powers, and some of the cars of the latter company ran into the train carrying the plaintiff. The accident happened entirely through the negligence of the servants of the North Western Company. At the trial the judge ordered a verdict to be entered for the defendants with leave to the plaintiff to move: in term the Court sustained the decision and held that the defendants were not liable.

The covetous greed of a young bovine gave the Court of Queen's Bench the trouble of deciding the case of *Buxton* v. *North Eastern R. W. Co.*, 3 Q. B. L. R. 549. A bullock tempted by better pasture on the other side of the line, forced his way through the hedge of the field in which he was enclosed, (though, by the way, the reporter does not show upon whose evidence the bullock's intentions were proved). The train in which one Buxton chanced to be collided with the animal while it was straying on the track, and Mr. B. being hurt by the shock sought to recover damages from the defendants. It appeared that he had been a passenger on the defendants' railway to be carried from Y. to T., and to reach T. it was necessary to travel over the line belonging to another company, and while journeying over the latter line the affair of the bullock took place. The Court held

that the contract having been made with the defendants they were the proper parties to be sued. A new trial was, however, granted because the judge had directed the jury that it was negligence in the defendants if the fences were insufficient; the Court considering that there was no statutory obligation on the company, towards their passengers, to keep up the fences.

"If mischief arises from the act of a stranger in leaving a log of wood across the railway, or doing any other act which might endanger a railway train passing along the line of another company, an action cannot be maintained against the railway company, because in that case there would not be any direct or indirect breach of duty, or breach of contract, on their part; they would not be liable on their own line, or on any other company's line for that:" so the judgment in *Thomas* v. *Rhimney, &c., ante*, is limited to mischief arising to a passenger in a railway train from some negligence or other of that one of the companies which is the owner of the line over which the party complaining of the injury is travelling. See also, *Latch* v. *Rimner R. W. Co.*, 27 L. J. (Ex.) 155.

Mytton v. *Midland R. Co.*, 4 H. & N. 615, decided that when a passenger had taken a ticket from a company to be carried through over another company's line, the contract is an entire contract with the company giving the ticket, and no action for negligence will lie against the other company. The same principle has been adopted by the American Courts. *Weeds* v. *Saratoga R. W.*, 19 Wends. 534, and see also *Muschamp* v. *Lancaster, &c.*, at p. 430. In *Great Western R. W.* v. *Blake, ante*, Crompton, J., doubted whether the injured passenger had any remedy against the company from which he did not get his ticket, as there was no privity between them: but he considered that the one company would have a remedy against the other.

And now having given some idea of the cloud of cases and authorities, dicta and decisions, wherewith the path of the railroad traveller is hedged in, this train of ideas—which perhaps has already run over too many lines—must be brought to a stand-still. It was the intention to notice some points decided anent travelling dogs, bulls and horses, but at present the reader must be content to draw his own deductions as to the law affecting these quadrupeds from what has been said with regard to bipedal donkeys, calves and puppies.

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COURT OF ERROR AND APPEAL.

Royal Canadian Bank v. Stevenson.

Appeal struck out as not having been set down within time allowed—Right of respondent to costs.

Where the Court refused to hear an appeal, and ordered it to be struck out because it had not been set down for argument within the time allowed by 34 Vic. ch. 11, sec. 40. *Held*, that the respondent, who had appeared to answer the appeal, was entitled to his costs, for the appellant should have applied earlier for an extension of the time, and that the Court had jurisdiction to grant costs, though the appeal had not been heard.

Semble, that the respondent should have stated the lapse of time as one of his reasons against the appeal.

COMMON LAW CHAMBERS.

Fralick v. Dormyn.

Ejectment—Better particulars of title—Application before appearance.

[Mr. Dalton, 8th April, 1873.

Held, that an order for better particulars of title in ejectment may be made before appearance is entered.

McCallum v. The Provincial Insurance Company.

Service of papers.

[Mr. Dalton, 18th April, 1876.]

Held, that service of a notice of trial counts from the time it comes into possession of the defendant or his attorney, after being put under the door of his office, not from the time it was so put under the door.

Chambers v. Unger.

Ejectment—Security for costs—C. S. U. C., ch. 27, Sec. 76.

[Mr. Dalton, April 18th, 1873.]

Held, on an application for security for costs under the above section, that the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order.

Carnegie v. Rutherford.

Service of papers—Wrong style of cause.

[Mr. Dalton, April 27th, 1873.]

A clerk, on the last day for notice of trial, while on his way to serve it, met the defendant's attorney's partner who, told him to go to the office and serve it there. When he arrived no one was in. He put it under the door and it was not received until next day. The christian name of the defendant was wrong, in the style of cause.

Held, that the service was good, but that the style of cause being wrong the notice must be set aside.

CHANCERY CHAMBERS.

Cattanach v. Urquhart.

Disputing note, effect of—Statute of Limitations, how set up as a defence to a mortgage suit—Mistake of Solicitor—Chambers.

[The Referee, and Blake, V. C., on appeal, January 22nd, 1873.]

Under a note disputing the amount of the plaintiff's claim, filed in a mortgage suit, questions as to the correctness of the account alone can be raised.

The Statute of Limitations cannot be set up under such a note, but must be pleaded.

An application was made to vacate a præcipe decree taken into the Master's office, and to allow, instead of a disputing note, an answer to be filed, setting up the Statute of Limitations. The motion was *held* to be properly made in Chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor, in supposing that the defence of the Statute was available under it.

Garforth v. Cairns.

Tender—Costs—Discretion of the Referee—Tender after suit brought.

[The Referee, May 10, 1873.]

Held, 1 following *Powney* v. *Blomberg*, 8 Jur. 746, that a letter by the defendant's solicitor to the plaintiff's solicitor before suit, offering to pay the plaintiff's demand, was not a tender.

2 A tender of a claim after suit brought upon it, must include costs incurred up to the date of the tender.

The claim for which a suit had been brought having been compromised, the question by whom the costs of the suit should be borne, was determined by the Referee in Chambers, on a summary application by consent of the parties. Upon appeal Strong, V. C., refused to interfere with the discretion exercised by the Referee as to costs.

Trust and Loan Company v. Start.

Delivery of Possession—General Orders 389 and 464.

[The Referee, May 27, 1873.]

After a sale under a decree, an order for delivery of possession will not, as a general rule, be made against a stranger to the suit, and *quære*, if there be any jurisdiction over strangers, except in a plain case such as of a person taking possession *pendente lite* without any pretence of paramount title.

Kincaid v. Kincaid.

Purchaser—Right to payment of incumbrances—Effect of taking a vesting order.

[The Referee, and Strong, V.C., on appeal, June 11-16, 1873.]

Payment of incumbrances out of the purchase money in Court refused, the purchaser having accepted a vesting order.

Dunn v. McLean.

Affidavit—Commissioner.

[The Referee, June 19, 1873.]

A, B and C were partners, doing business in Chancery. A, B and D were partners doing business at Common Law. An affidavit tendered by C. on an application in Chancery, was rejected, it having been sworn before D.

ENGLISH REPORTS.

DIGEST OF ENGLISH LAW REPORTS

FOR NOVEMBER AND DECEMBER, 1872.

From the American Law Review.

Account.—*See* Husband and Wife.

Accumulation.—*See* Will.

Ademption.—*See* Legacy, 2.

Advance.—*See* Legacy, 2; Will.

Advertisement.—*See* Copyright.

Age.

There is a presumption that a woman forty-nine years and nine months of age, and twenty-six years married, without having had children, is past child-bearing.—*In re Millner's Estate*, L. R. 14 Eq. 245.

Allotment.—*See* Company, 1.

Appointment.

A wife having real estate settled upon her with a power of appointment, appointed as collateral security for a mortgage debt of her husband. *Held*, that the wife's rights against her husband's estate were those of a simple contract creditor only.—*Ferguson* v. *Gibson*, L. R. 14 Eq. 379.

See Power, 2, 3; Settlement, 3, 4.

Arbitration.—*See* Broker.

Assignment.—*See* Bankruptcy, 1; Lease, 2.

Attorney.—*See* Carrier, 1; Privileged Communication.

Average.

Salt was insured free from average, unless general, or the ship be stranded, during a certain voyage. In consequence of bad weather during the voyage, the ship's anchors were lost and her masts cut away, and the ship towed on to a bank by salvors, where she sustained further damage. The salt, which was much damaged, was sold under a decree of the Admiralty Court, and the proceeds were entirely consumed by expenses of sale. *Held*, that the seizure and sale by said court did not render the partial loss a total loss; but that there was a stranding within the policy.—*De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

Bailment.—*See* Carrier.

Bankruptcy.

1. At the request of T., M. paid the amount due on certain bills drawn by M. and accepted by T., and T. assigned to M. his interest in certain engines, &c. (which constituted his whole property), as security for the money due on the bills, and also for other moneys due from T. to M. *Held*, that the assignment was not an act of bankruptcy.—*Ex parte Reed & Steel. In re Twedell*, L. R. 14 Eq. 586.

2. By agreement under the English Bankruptcy Act, 1869, creditors were to receive a composition payable by instalments. *Held*, that on default in payment of an instalment, creditors could maintain an action at law for their whole debt.—*In re Hatton*, L. R. 7 Ch. 723.

See Surety.

Bequest.—*See* Contributory; Devise; Executors and Administrators, 2; Legacy; Power, 1; Will.

Bill in Equity.

A bill having been filed by an insurance company to cancel a policy on the ground of fraud, a motion was made to restrain an action brought upon the policy after the filing of the bill. *Held*, that the Court of Chancery had jurisdiction, but would not interfere, as the case might be more suitably tried by a jury.—*Hoare* v. *Brembridge*, L. R. 14 Eq. 522.

Bill of Lading.—*See* Charter-party, 2; Salvage, 3.

Bills and Notes.—*See* Bankruptcy, 1; Lien, 1.

Bond.—*See* Bottomry.

Broker.

The defendant, as selling broker, made a contract for his principal in the following terms: "October 26, 1869. Sold by order and for account of P. [his principal] to my principals, S. & Son, to arrive, 500 tons black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London at 22*s.* per cwt.—D. pd.—Shipment November or December, 1869." Raisins arrived, which the defendant rejected as not of fair average quality, though it appeared they were of fair average quality for the year 1869. *Held*, that whether by the contract the raisins were only to be of fair average quality for the year 1869, or fair average quality generally, the broker was not liable for an error in judgment.—*Pappa* v. *Rose*, L. R. 7 C. P. (Ex Ch.) 525; s. c. L. R. 7 C. P. 32; 6 A. M. Law Rev. 475.

Cargo.—*See* Lien, 1.

Carrier.

1. The plaintiff delivered a bullock to a railway company for transportation to N., and the animal was put upon a proper and sufficient railway truck, ordinarily used for the conveyance of cattle. The bullock escaped and was killed, without negligence on the part of the company. *Held*, that as the bullock was killed in consequence of his "inherent vice," the company was not liable.—*Blower* v. *Great Western Railway Co.*, L. R. 7 C. P. 655.

2. The defendants received, to be carried on their railway, a horse that was quiet and accustomed to travel by rail. No accident happened to the train, nor any thing likely to alarm the horse, but at the end of the journey the horse was found to be injured. *Held* (by Bramwell and Martin, BB.; Pigott, B., dissenting), that the company was not liable, as the presumption was that the injury happened from the "proper vice" of the horse.—*Kendall* v. *London and South-western Railway Co.*, L. R. 7 Ex. 373.

CHARGE.

A tenant for life with proviso for renewal, whose estate was subject to certain charges, neglected to insist upon the renewal of the lease, which if duly renewed would have still been subject to said charges. The tenant purchased the reversion, which was conveyed to trustees to prevent merger of the term. *Held*, that the charges on the renewable term were fastened on the reversion also.—*Trumper* v. *Trumper*, L. R. 14 Eq. 295.

See LEGACY, 6.

CHARITY.—*See* LEGACY, 1.

CHARTER-PARTY.

1. Under a charter-party a vessel was to proceed to a certain dock and be there loaded by the charterers before a certain day. In an action against the charterers for breach of contract, the defendants pleaded that they had no notice of the vessel's arrival at said dock, and of her being ready to receive cargo; "wherefore the defendants did not, nor could, load." *Held*, that the quoted words must be treated as an allegation that the defendants without said notice would not have fair means of knowing that the vessel had arrived, and that such notice was necessary.—*Stanton* v. *Austin*, L. R. 7 C. P. 651.

2. Under a charter-party a vessel was to carry a cargo, "the act of God, the queen's enemies, restraints of princes and rulers, and danger of the seas excepted." A bill of lading was signed referring to the charter-party, but excepting "the danger of the seas only." *Held*, that the single exception of danger of the seas in the bill of lading did not exclude the other perils mentioned in the charter-party.—*The San Roman*, L. R. 3 Ad. & Ec. 583.

CHILD-BEARING.—*See* AGE.

CLAY.—*See* MINES.

COLLISION.

1. A steam-tug by collision caused a vessel to go adrift, and the latter was rescued by the tug *W*. *Held*, that the *W*. was not disentitled to salvage by the fact that some of her owners were owners of the colliding tug.—*The Glengaber*, L. R. 3 Ad. & Ec. 534.

2. A schooner, close-hauled on the starboard tack, saw the starboard light and two towing-lights of a steam-tug three points upon her port bow about a mile off. The tug was towing a fully laden vessel against a head wind in open sea. The schooner kept her luff, and the tug kept its course and came into collision with the schooner. *Held*, that the tug alone was to blame for the collision.—*The Warrior*, L. R. 3 Ad. & Ec. 553.

COMPANY.

1. The defendant was appointed and acted as director of a company, thereby becoming liable for twenty-five shares. In ignorance of this, the defendant applied for twenty shares, thinking such action necessary to qualify him as director, and the shares were allotted to him. The company was ordered to be wound up. *Held*, that the defendant was properly placed upon the list of contributors for forty-five shares.—*In re British and American Telegraph Co.*, L. R. 14 Eq. 316.

2. The secretary of a committee of shareholders, appointed to watch the proceedings of the directors of the company, was prosecuted by said directors for libel. The directors and the company were restrained at the suit of a shareholder from applying the funds of the company in payment of the costs of the libel suit, but were not, under the circumstances of the case, ordered to repay sums already so applied. *Per* WICKENS, V. C., "The special powers, given either to the directors or to a majority, by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle, which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence.—*Pickering* v. *Stephenson*, L. R. 14 Eq. 322.

3. By the articles of association of a company it was agreed that no dismissal of S., the manager, should be effectual, "unless the company should, if required by him, pay him the full amount of money paid upon the shares held by him in the company." S. paid £2000 on his shares; the company was wound up. S. was appointed one of the liquidators, and received £400 for his services. *Held*, that the winding up of the company was equivalent to the dismissal of S., who was therefore entitled to prove in the winding up for £2000, of which the £400 received by him as liquidator must be taken as part payment.—*In re Imperial Wine Company. Shirreff's Case*, L. R. 14 Eq. 417.

4. G., a shareholder in a limited company, transferred his shares to A., an infant, who transferred them to D., another infant, who transferred them to B. The transfers were all registered. B., who was *sui juris* at the date of the transfer, afterwards became bankrupt. *Held*, that G. continued liable as a member until the transfer to B. was registered, and that G.'s name must be placed on the list of contributories as a part shareholder.—*In re Contract Corporation. Gooch's Case*, L. R. 14 Eq. 454.

5. A company deposited deeds with a bank as collateral security for bills under discount, without conforming to the formalities required by the articles of association. *Held*, that the mortgage was valid and covered the whole amount due the bank from the company, when wound up.—*In re General Provident Assurance Co. Ex parte National Bank*, L. R. 14 Eq. 507.

See SURETY.

COMPOSITION.—*See* BANKRUPTCY, 2.

COMPROMISE.

In dealing with a compromise within the power of the parties to it, all that a court of justice has to do is to ascertain that the claim

on the one side and the answer or counter claim on the other is *bona fide* and truly made. —*Dixon* v. *Evans*, L. R. 5 H. L. 606.

See EJECTMENT.

CONSTRUCTION.—*See* BROKER; CHARTER-PARTY; COMPANY, 3; CONTRACT; CONTRIBUTION; DEVISE; EXECUTORS AND ADMINISTRATORS, 2; INSURANCE; LEASE, 1; LEGACY; MINES; POWER, 1; SETTLEMENT, 2, 4; STREET; WILL.

CONTRACT.

The defendant contracted with the plaintiff for the purchase of maize "to be shipped from Danube. For shipment in June and [or] July, seller's option." Cargoes of maize were shipped, and the bills of lading were dated June 4, but the loading had been begun in May and had ended June 4. The defendant refused to accept the maize. The jury found that said cargoes were June shipments. *Held*, by MARTIN, B., and LUSH, J., that the construction of the contract was properly left with the jury. By BLACKBURN and MELLOR, JJ., that said cargoes were June shipments. By KELLY, C. B., that the construction of the contract was for the court, and that said cargo should have been shipped entirely in June or July. Judgment for plaintiff.—*Alexander* v. *Vanderzee*, L. R. 7 C. P. (Ex. Ch.) 530.

See BROKER; CHARTER-PARTY; COMPANY, 1, 3; DAMAGES, 2; LIEN, 1; PARTNERSHIP, 1; SALE.

CONTRIBUTION.

A testator gave a pecuniary legacy, and devised his real estate without charging it with his debts. His personal estate proved insufficient for payment of debts. *Held*, that the real estate was not liable to contribute ratably to the deficiency.—*Dugdale* v. *Dugdale*, L. R. 14 Eq. 234.

See COMPANY, 1, 4.

COPYRIGHT.

1. There is no copyright in an advertisement. The plaintiff, a furniture dealer, had issued a descriptive catalogue, with illustrations. The defendant issued a similar catalogue, copying a small part of the plaintiff's preface and many of his illustrations and descriptions. There was no exclusive property in the articles described. An injunction was granted to restrain the defendant from publishing the small part of the preface, but refused as to the illustrations and descriptions. —*Cobbett* v. *Woodward*, L. R. 14 Eq. 407.

2. Injunction obtained by the proprietor of *The Birthday Scripture Text Book* against the publication of *The Children's Birthday Text Book*, as an infringement of the copyright of title, and as a colorable imitation of the former.—*Mack* v. *Petter*, L. R. 14 Eq. 431.

COSTS.—*See* COMPANY, 2; COPYRIGHT.

COUNSEL.—*See* PRIVILEGED COMMUNICATION.

COVENANT.—*See* LEASE, 2; SETTLEMENT, 4.

DAMAGES.

1. The plaintiff carried on business in a warehouse held on long lease, and next to a free dock on the Thames. The dock was filled up under certain embankment acts, and the plaintiff's premises thereby permanently injured with reference to the uses that he or any owner might put upon them. *Held*, that the plaintiff was entitled to compensation. See Land Clauses Consolidation Act, 8 & 9 Vict. c. 18, § 68.—*M'Carthy* v. *Metropolitan Board of Works*, L. R. 7 C. P. 508.

2. The plaintiff had a contract for furnishing a certain number of shoes at an exceptionally high price of 4*s.* per pair if delivered February 3. The plaintiff delivered the shoes to a railway company, with notice that if they were not delivered on said day they would be thrown on the plaintiff's hands. Said company failed to deliver the shoes in time, and they were sold at 2*s.* 9*d.* per pair, the market price. *Held*, that in the absence of notice of said contract price, the plaintiff could not recover as damages the difference between the market price and said contract price.—*Horne* v. *Midland Railway Co.*, L. R. 7 C. P. 583.

3. The plaintiffs were owners of a rifle range, part of which was over land leased by a verbal agreement only. A company took part of the plaintiff's land under a special statute. *Held*, that the plaintiffs had suffered damage, although part of the land covered by the rifle range was held on precarious tenure. *Holt* v. *Gaslight and Coke Co.*, L. R. 7 Q. B. 728.

See CARRIER, 2; COLLISION, 1.

DANGER OF THE SEAS.—*See* CHARTER-PARTY, 2.

DETINUE.

The father of A., an insolvent, agreed to give notes for ten shillings on the pound to trustees, for the benefit of creditors, who were to sign a deed of composition under the English Bankrupt Act. A.'s father ordered the trustees not to part with the notes, and a creditor brought suit against the father, with one count in detinue for the notes, and another on the notes. *Held*, that the count in detinue failed, as the trustees were not holding the notes as agents of the defendant; and that the second count failed, as the trustees were not holding the notes as agents of the plaintiff.—*Latter* v. *White*, L. R. 5 H. L. 578; s. c. L. R. 6 Q. B. (Ex. Ch.) 474; L. R. 5 Q. B. 622; 6 Am. Law Rev. 290.

See JUDGMENT.

DEVISE.

1. A testator devised an estate to trustees on trust to permit his son G. to receive the rents and profits during his life, and after his death to permit G's son and the heirs male of his body to receive the rent and profits during their respective lives, severally and successively, in tail male. *Held*, that said son of G. took an estate tail.—*Hugo* v. *Williams*, L. R. 14 Eq. 224.

2. A. gave his daughter a leasehold estate, remainder of his property to his wife, the income "unto my wife for her life, and at her decease unto my daughter for her own benefit, and her children, or only one child if

she should have any." All given to the daughter to be for her own benefit, and not subject to the control of any husband. If the daughter should die without issue, then said leasehold estate, together with all left to the wife for life, over. *Held*, that the daughter was absolutely entitled to said leasehold estate and to said remainder, and that the limitation over if the daughter should die without issue was void for remoteness.—*Fisher* v. *Webster*, L. R. 14 Eq. 283.

3. A testator devised his estate to his son A. for life; remainder during A.'s life to trustees, to preserve contingent remainders; remainder to B., eldest son of A., for life; remainder to B.'s first and other sons successively in tail male; and for default of such issue, to R., second son of A, for life, with remainder to his first and other sons successively in tail male; and for default of such issue to the third, fourth, and other sons of A., thereafter to be born successively in tail male; and in default of such issue, to I., the testator's daughter, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to E., eldest daughter of A., for life, remainder to her first and other sons successively in tail male; and for default of such issue, to I. B., second daughter of A., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to S., third daughter of A., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth, and other daughters of A. successively, for life, with remainders to the heirs male of their bodies respectively; and "for default of such issue, to the use and behoof of all and every other the issue of my body;" and for default of issue to the testator's heirs. The testator added that it was his desire to keep said estates in one person; and he made it incumbent on the females in the line of descent, if married, to take, with their husbands, the testator's name. He also directed a certain chest or muniment box to go to the person entitled to his real estate from time to time. B. came into possession of said estates, and executed a disentailing deed, reciting that the estate tail was vested in him expectant on the failure or determination of the estates in tail male limited to his first and other sons, and the death and failure of issue male of his brothers and sisters, and all reversions and remainders thereon expectant or dependent. B. then devised the estates to the defendant. Said I., the testator's daughter, had died in B.'s lifetime, and B.'s brothers and sisters died without leaving issue male. E. was the last tenant in tail under the specific limitations in the will, and died, leaving a daughter. Actions were brought against the defendant as follows: first, by parties claiming jointly under the penultimate limitation in the will, as being all the issue of S. (a second daughter of the testator, deceased before the date of the will) living at the death of E.; secondly, by said daughter of E., as heiress in tail general of the testator at the time the penultimate limitation took effect in possession; thirdly, by the heir of the survivor (a daughter of S.) of all the issue of testator living at his death other than those included in the particular limitations; and, fourthly, by a grandson of S., claiming as heir in tail of the testator at his death, all those being excluded who came within the particular limitations. *Held*, first, that the words, "issue of my body," in the penultimate limitation in the will, were to be read as "heirs of my body." Secondly, that the devise, "to the issue of my body," did not, having regard to the whole will, have the effect of giving the estate *per capita* in joint tenancy among all who came within the class at the time of vesting in possession. Thirdly, that the words "all and every" were satisfied by all taking in succession. Fourthly, that the word "other" was not to be read only as excluding those within the class already provided for, but as completing a provision for all the issue, so as to make the estates go over by force of the words at the end of the penultimate limitation, "in default of such issue" only upon failure of all the issue of the testator. And that it followed by the rule in *Mandeville's Case*, Co. Litt. 26 *b*, that, by virtue of the penultimate limitation, there was, at the death of the testator, a vested remainder in the heirs of his body in tail: that this remainder descended to B., who, being tenant for life in possession, was qualified to execute said disentailing deed so as to acquire the absolute disposition of the estates, subject to the estates preceding the penultimate limitation. The particular limitations having failed or determined, the devisee of B. took an absolute estate. Judgment for defendant.—*Allgood* v. *Blake*, L. R. 7 Ex. 339.

4. Devise in trust for all testator's children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. Proviso, that notwithstanding the trust aforesaid, on the marriage of any daughter, a moiety of her share should be held in trust for such daughter for life, remainder to her children. *Held*, that said proviso applied to the case of a daughter marrying under twenty-one only.—*In re Dowling's Trusts*, L. R. 14 Eq. 463.

See Contribution; Executors and Administrators, 2; Legacy; Power, 1; Will.

Director.—*See* Company, 1, 2.

Distribution.—*See* Will.

Divorce.—*See* Settlement, 2.

Documents, Inspection of.

The plaintiff filed a bill to establish his title by descent to certain lands, and prayed inspection of certain documents. The defendants stated in their answer that documents A., except as to a part left open, did not tend to make out the title of the plaintiff; that persons not parties to suit were interested in documents D.; that documents Y. did not relate to any matter to be tried in the case, but were exclusively documents which the plaintiff would be entitled to the production of by way of consequential relief if he succeeded in the case. *Held*, that documents

Y. and A. were protected, a pedigree not being such an entire document as to entitle the plaintiff to see the whole if entitled to see part; and that documents D. were not protected.—*Kettlewell* v. *Barstow*, L. R. 7 Ch. 686.

Dwelling-place.—*See* Shop.

Easement.—*See* Damages, 1.

Ejectment.

Earls A., B., and C., were successive tenants in tail of property held under an inalienable parliamentary title. B., after the death of A., entered into possession of the entailed estates, and, with them, of certain leaseholds formerly in the possession of A. A.'s executors brought ejectment against B. to recover the leaseholds. B. died *pendente lite*, and another action was brought against C., the successor to the title. C., who was also executor of B., compromised the action on terms of giving judgment, buying the leaseholds, and allowing a debt of £4000 as a debt from B.'s estate for mesne profits. Before the compromise a creditor's suit was instituted, and a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s executors to prove against B.'s estate for the amount of rents actually received by him, *held*, that the admission of C., being made as a compromise and after a decree in an administration suit, was insufficient to charge the estate of B.—*Talbot* v. *Earl of Shrewsbury*, L. R. 14 Eq. 503.

Equity.—*See* Bill in Equity; Partnership, 3; Settlement, 1.

Estate for Life.—*See* Legacy, 5.

Estate Tail.—*See* Devise, 1, 3; Legacy, 6.

Estoppel.—*See* Married Woman.

Evidence.—*See* Executors and Administrators, 3; Libel, 2; Stamp.

Executors and Administrators.

1. The creditor of a testator filed a bill against the latter's wife, alleging that administration with the will annexed had been granted to the wife, who was "the only legal personal representative and also heir of the undisposed of movables and immovables" of the testator, and that the wife had received and entered into the possession and enjoyment of all the real and personal effects of the testator. The defendant pleaded that she was not administratrix with the will annexed or legal personal representative of the testator. *Held*, that the plea admitted facts constituting the defendant an executrix *de son tort*.—*Rayner* v. *Kœhler*, L. R. 14 Eq. 262.

2. By statute, if a testator does not dispose of residuary estate, his executors take it for the benefit of the next of kin, unless a contrary intention appear. A testator appointed his two sons executors, but made no residuary bequest. By a codicil he directed that the residuary legatees in his will should receive the residue without any deductions. *Held*, that said executors did not take the residue, and that there was no disposition of the same under the will and codicil.—*Travers* v. *Travers*, L. R. 14 Eq. 275.

3. In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate), *held*, to be *prima facie* evidence of debt, as against the persons interested in the real estate; but said persons were to be at liberty to adduce rebutting evidence.—*Harvey* v. *Wilde*, L. R. 14 Eq. 438.

See Husband and Wife; Power, 4.

Fact, Mistake of.—*See* Company, 1.

Freight.—*See* Insurance.

General Average.—*See* Average.

Hotchpot.—*See* Will.

Husband and Wife.

A wife had paid certain sums into a bank under an account as executrix of her father. The wife's husband deposited other sums to the same account, and the wife paid checks for her husband's creditors and for mutual debts of both husband and wife. The husband died, and shortly afterward the wife. *Held*, that said sums deposited by the husband were a gift to the wife.—*Lloyd* v. *Pughe*, L. R. 14 Eq. 241.

See Marriage; Settlement, 1.

Income.—*See* Legacy, 6.

Infant.

Four infant daughters were entitled to a reversion expectant upon a life-estate subject to a provision that in case a child should die under twenty-one, and without having married, her share should go to the survivors. There being no other means, the court charged said reversion with a sum sufficient for the maintenance and education of the infants, under a plan securing its repayment.—*De Witte* v. *Palin*, L. R. 14 Eq. 251.

See Company, 4.

Injunction.—*See* Company, 2; Copyright, 1, 2; Trade-mark, 2.

Innkeeper.—*See* Lien, 2.

Injury.—*See* Carrier, 2.

Inspection of Documents.—*See* Documents, Inspection of; Privileged Communication.

Insurance.

The plaintiffs had insured with the defendants, "lost or not lost, in the sum of £500 upon the freight payable to them in respect of this present voyage between as below, by the vessel *Napier* from Baker's Island, . . . the insurance on said freight beginning from the loading of the said vessel." When the vessel had taken in two-thirds of the cargo ready for her at Baker's Island, she was wrecked. *Held*, that the policy had not attached.—*Jones* v. *Neptune Marine Insurance Co.*, L. R. 7 Q. B. 702.

See Average; Bill in Equity.

Joint Tenant.—*See* Legacy, 5.

Judgment.

Detinue for a piano-forte. Plea, that the

act complained of was the joint act of the defendant and T., and that the plaintiff had recovered judgment for said act against T, and that said judgment still remained in force. *Held*, that said judgment, though unsatisfied, was a bar to the present action.—*Brinsmead* v. *Harrison*, L. R. 7 C. P. (Ex. Ch.) 547; s. c. L. R. 6 C. P. 584; 6 Am. Law Rev. 496.

Jurisdiction.—*See* Bill in Equity.

Lapse.—*See* Legacy, 4.

Lease.

All coal and other mineral veins under certain lands were demised by lease containing the clause, "they, the lessees, their executors, administrators, and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, for the damage done to them respectively by the surface of their lands being covered with rubbish, or otherwise injured, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors by getting mines of coal or other minerals under any of the dwelling-houses or other buildings of the said lessors, according to the covenant thereinafter contained. By said covenant, in case of the construction of said buildings, the lessees were to repair the same, and for each acre damaged to pay a certain sum, to be determined by arbitration, on payment of which sum the lessees were to have the free use, possession, and enjoyment of the land damaged for the remainder of the term." *Held*, that by the lease the lessees held the mines absolutely without being obliged to leave support for the surface, but that they must pay damages in case of injury by bringing down the surface, as provided in the lease.—*Smith* v. *Darby*, L. R. 7 Q. B. 716.

2. Two partners were assignees of a lease containing a covenant not to assign without the consent of the lessor. One partner subsequently assigned his interest to the other without the lessor's consent. *Held*, a breach of the covenant.—*Varley* v. *Coppard*, L. R. 7 C. P. 505.

See Charge; Mines, 1.

Legacy.

1. A testator left a legacy to the Kent County Hospital. In fact there was no such hospital; but there were three hospitals, called the Kent and Canterbury Hospital, the West Kent General Hospital, and the Kent County Ophthalmic Hospital *Held*, that the testator must be presumed to have intended a general hospital, and that the two former of said three hospitals must divide the legacy.—*In re Alchin's Trusts*, L. R. 14 Eq. 230.

2. A testator gave £500 to his sons T., J., and P., and £200 to his daughter; and he directed that neither of his said sons to whom he should have made advances should receive said legacy without bringing such advances into hotchpot. The residue of his personal estate the testator divided between his sons C., T., J., and P., and his daughter. The testator, before the date of the will, had advanced to C. £500, £170, and £58; and to T, after said date, £380 and £500. *Held*, that the advances to C. (who had received no legacy of £500) should not be taken into account against him; but that the £380 advanced to T. should be deducted from his share of the residue, and that his legacy of £500 was satisfied by the advance of that sum.—*In re Peacock's Estate*, L. R. 14 Eq. 236.

3. A testator bequeathed all his property to his sister S. for life, and after her decease to be equally divided among his brothers and sisters. The testator added, "should any of my brothers or sisters die (leaving issue) during the lifetime of my sister S., the share which would have been theirs is to be equally divided among their children." *Held*, that the children of a brother of the testator, who died fifteen years before the date of the will, were entitled to share in the estate.—*Adams* v. *Adams*, L. R. 14 Eq. 246.

4. A testator gave personal estate to trustees "to pay and transfer the same unto" certain parties "in equal seventh shares, as tenants in common, and to their respective executors, administrators and assigns, to whom I bequeath the same accordingly; and I declare that such shares shall be vested interests in each of my said residuary legatees, immediately upon the execution hereof, and that the shares of such of them as are married women shall be for their own separate use and disposal." *Held*, that the share of a married woman who died after the date of the will, but before the testator, lapsed, and did not go to her husband.—*Browne* v. *Hope*, L. R. 14 Eq. 343.

5. Bequest to E. to accumulate during the lifetime of her husband, and upon his death, "should there be any child or children living, that the property should be secured for their benefit, and for that of their mother." *Held*, that the property should be settled upon E. for life, with remainder to her children.—*Combe* v. *Hughes*, L. R. 14 Eq. 415.

6. A testator bequeathed to his wife "all sums of money that have come into my hands as part of her patrimony, being in fact a charge upon the property; this, as well as all just debts and obligations due from me, to be duly discharged as the first act of my executors." *Held*, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as on the rest of the property. A bequest to a widow of the "free occupancy" of a house confers on her the right to let it. A devise to the testator's children of "all the income of real property" carries the fee. Direction that any property might be sold except Glencoe, "a property I wish to remain in the family as long as there is a lineal son, descendant of the forenamed sons; and if no lineal male descendant from the eldest, the next to be entitled, and so on." *Held*, a devise of an estate in tail male in possession to the eldest son.—*Mannox* v. *Greener*, L. R. 14 Eq. 456.

Digest of English Law Reports.

Letter.—*See* Privileged Communication, 2.

Libel.

1. The plaintiffs had furnished the Lords of the Admiralty with certain plans for plating wooden vessels with iron. A letter from the controller of the navy to the Board of Admiralty was printed by the defendant in a blue book, containing the following words: "These plans would have no weight whatever, from the known antecedents of their author;" *innuendo*, that said plans were worthless. *Held*, that said publication was a fair criticism upon a matter of national importance, and was privileged on the absence of malice.—*Henwood* v. *Harrison*, L. R. 7 C. P. 606.

2. Libel for words used in a certain letter. The Plaintiff gave the defendant notice to produce said letter, but the defendant swore that "the letter referred to in the affidavit of the plaintiff" had been destroyed. It was *held*, that the plaintiff might give secondary evidence of the words in the letter by witnesses; but that the words as laid in the declaration must be proved, and not merely what a witness conceives to be the substance of them. Also, that though said affidavit of the plaintiff contained the alleged defamatory words, the defendant had not, by the above answer, admitted them.—*Rainy* v. *Bravo*, L. R. 4 P. C. 287.

See Company, 2.

License.—*See* Realty.

Lien.

1. B. consigned to the defendants by the ship *Acacia* a cargo which had been purchased at their joint risk, and informed the defendants of bills drawn, payable to his own order, against the cargo. The defendants replied that B.'s drafts should have protection. B. indorsed the bills to the plaintiffs, who refused to accept, as B. had in the mean time stopped payment. The plaintiffs claimed a lien for the amount of said bills on the cargo. *Held*, that the plaintiffs had no lien.—*Robey & Co's Perseverance Ironworks* v. *Ollier*, L. R. 7 Ch. 695.

2. An innkeeper received a guest who brought with him a hired piano, which the innkeeper believed to belong to the guest. *Held*, that the innkeeper had a lien upon the piano against its owner for the guest's board.—*Threfall* v. *Borwick*, L. R. 7 Q. B. 711.

See Company, 5.

Limitations, Statute of.—*See* Partnership, 3.

Maintenance and Education.—*See* Infant; Settlement, 1.

Married Woman.

Semble, a married woman is bound by estoppel in a deed duly executed and acknowledged by her, in the same manner as if she were *sole*.—*Jones* v. *Frost*, *In re Fiddey* (*a solicitor*), L. R. 7 Ch. 773.

See Age; Husband and Wife; Settlement, 1.

Marshalling Assets.—*See* Contribution; Specialty.

Mesne Profits.—*See* Ejectment.

Mines.

1. By lease was demised a seam of coal, called the High Hazel Bed, containing 108*a.*, with power to dig pits, get and carry away all of the said bed of coal. The lessees were to pay a minimum rent of £200 as for two acres, and £85 per acre for every additional acre, including all ribs and pillars left in working the coal, except certain specified pillars which were not for support of the surface, and which were to be left and not paid for. The lessees covenanted *inter alia* to work the mine to the best of their skill, and in a good and workmanlike manner. The lessees left the said specified pillars, and worked the mines according to the usual course of mining in the district. *Held*, that the lessees were not liable for a subsidence of the soil caused by said mining operations.—*Eadon* v. *Jeffcock*, L. R. 7 Ex. 379.

2. The lord of a manor granted the freehold in certain land, reserving "all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals." There was no provision for compensation to the grantee for the use of the mines. There was a bed of china clay under said land, but none had ever been taken at the time of said grant. Tin, which was known to exist in the neighborhood, was usually got by "streaming," an ancient method, which destroyed the surface of the land. Said clay could not be obtained without destroying the surface. *Held*, that said clay was included in the reservation, but that it could not be got in such a way as to destroy or seriously injure the surface.—*Hext* v. *Gill*, L. R. 7 Ch. 699.

See Lease, 1.

Mortgage.—*See* Company, 5.

Negligence.—*See* Carrier, 1.

Notice to Quit.

The tenant of an estate being imbecile, his daughter took care of his house, and, with her brothers, managed the farm. A bailiff, who was known to the daughter as such, delivered to her a notice to quit, addressed to her father. A son read the notice, but the daughter did not, but burnt it, without showing it to her father. *Held*, that the daughter was an agent of the tenant for the purpose of receiving the notice, and that, being such agent, no failure in duty as to delivering the notice to the tenant would render the notice invalid.—*Tenham* v. *Nicholson*, L. R. 5 H. L. 561.

Partnership.

1. An inalienable government contract entered into by one partner may be a part of the partnership assets; and upon the dissolution of the partnership, the partner who entered into the contract, and who continues to carry it on, must be debited with its value, to be ascertained by reference to chambers.—*Ambler* v. *Bolton*, L. R. 14 Eq. 427.

2. Right to participate in the profits of trade does not necessarily create partnership. Whether partnership exists or not must depend upon the real contract and intention of the parties.—*Mollero, March, & Co.* v. *The Court of Wards*, L. R. 4 P. C. 419.

3. Where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes upon the remedy it affords the same limitation.

The Statute of Limitations applies to a bill in equity brought by the executor of a deceased partner against the surviving partner, demanding an account of the partnership concerns. It seems that the *punctum temporis* from which the statute begins to run is the date at which the partnership came to be vested in the surviving partner.

There is no fiduciary relation between such surviving partner and executor; neither is such surviving partner a trustee, properly so called, for such executor. (Hatherly, L. C., dissenting.)—*Knox* v. *Gye*, L. R. 5 H. L. 656.

Patent.—*See* Trade-mark, 2.

Payment.

Cancellation of a debt *held* not to be "payment in cash" of a sum due from the creditor for shares in a company, under the Companies Act, 1867, § 25.—*Cleland's Case*, L. R. 14 Eq. 387.

Pedigree.—*See* Documents, Inspection of.

Personalty.—*See* Realty.

Pleading.—*See* Charter-party, 1; Executors and Administrators, 1.

Power.

1. By statute a will speaks from the death of the testator; and a general devise operates as an execution of a power, unless a contrary intention appear in the will. By settlement stock was given to trustees, subject to such trusts as the settlor should by deed or will appoint, and, in default of such appointment, in trust for the petitioner. The settlor had executed a will five weeks before said settlement, containing a general residuary bequest. *Held*, that the court might look into surrounding circumstances in order to put a construction upon the above instruments, and that, under the circumstances of the case, the will did not act as an execution of said power.—*In re Ruding's Settlement*, L. R. 14 Eq. 266.

2. The donee of a power appointed a life interest to M., an object of the power, and then delegated to M. a power to appoint a life interest to a stranger to the power, and subject thereto appointed the property to the children of M., objects of the power. *Held*, the delegated power was void, but the subsequent appointment good.—*Carr* v. *Atkinson*, L. R. 14 Eq. 397.

3. Power given to A. to appoint by any deed or instrument in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of two or more witnesses. *Held*, to be well exercised by the will of A., not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published, and acknowledged and declared" to be her will in the presence of three witnesses.—*Smith* v. *Adkins*, L. R. 14 Eq. 402.

4. A power of sale given by a testator to his executors and administrators may be exercised by an administrator *durante minore ætate*.—*Monsell* v. *Armstrong*, L. R. 14 Eq. 423.

See Settlement, 3; Specialty Debt.

Preferred Claim.—*See* Age; Stamp.

Principal and Agent.

When an agent makes a contract on behalf of his principal, he impliedly warrants that he has authority to bind said principal; and if it turns out that he has in fact no such authority, he becomes liable on such warranty. Otherwise, if the party dealing with the agent knows all the facts, and contracts with the agent under an erroneous belief that such a state of facts gives the agent legal authority to bind the principal; under such circumstances, the agent is not personally liable.—*Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777.

Privileged Communication.

1. Documents passing between defendants or their agents and their solicitors *ante litem motam*, and described in the defendants' affidavit as "communications passing between us" or our agent "and our solicitors, with reference to matters which are now in question in this cause; and that the same are confidential communications as between solicitor and client," protected from production. A telegram passing *ante litem motam* between the defendants and a solicitor, then acting between all the parties in the matter, afterwards the subject of this suit, not privileged.—*Macfarlan* v. *Rolt*, L. R. 14 Eq. 380.

2. Letters or communications passing between solicitor and client before litigation commenced, but which afterwards did commence, relating to a contract which had been entered into and which led to litigation, are privileged.—*Wilson* v. *Northampton & Banbury Junction Railway Co.*, L. R. 14 Eq. 477.

3. Communications with counsel, with a view to obtain legal advice, or with a person not a solicitor, but acting as his deputy, are privileged. It appears that the court has discretion whether or not to order the inspection of documents admitted to be relevant and not strictly within the privilege. If documents are notes of a case for counsel, inspection should be refused. If they fall short of that, inspection should, as a general rule, be granted.—*Fenner* v. *London & South-Eastern Railway Co.*, L. R. 7 Q. B. 767.

Proof.—*See* Executors and Administrators; Stamp.

Proviso.—*See* Devise, 4.

Quit, Notice to.—*See* Notice to Quit.

Realty.

A floating derrick was anchored for several years under a license in a river, for the pur-

pose of loading and unloading coal. *Held*, that the anchors and derrick were not so attached to the bed of the river as to be ratable as "a house, building, land, tenement, or hereditament."—*Cory* v. *Churchwardens of Greenwich*, L. R. 7 C. P. 499.

Remainder.—*See* Devise, 2, 3; Legacy, 5.

Remoteness.—*See* Devise, 2.

Reservation.—*See* Mines.

Residuary Legatee.—*See* Executors and Administrators, 2.

Reversion.—*See* Charge; Infant.

Sale.

By the law of Scotland, in case of the purchase of goods by sample, the purchaser may return the same after acceptance, if they do not correspond with the sample; otherwise by the English law.—*Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250.

See Contract.

Security.—*See* Appointment; Company, 5.

Set-off.—*See* Payment.

Settlement.

1. Upon marriage, a woman induced her husband to give up his only means of support, and thereafter for a time both were supported by the wife's mother. After the latter's death, the wife came into a large separate income. From the wife's misconduct the husband was obliged to leave her, and eventually a settlement was made whereby the husband was allowed a small annuity. Subsequently the wife became possessed of a further sum, and prayed the court to decree a settlement of the same upon her. *Held*, that under the circumstances the court would not deprive the husband of his right to said sum.—*Giacometti* v. *Prodgers*, L. R. 14 Eq. 253.

2. By a marriage settlement the wife's property was vested in trustees upon trust during the joint lives of the husband and wife for the separate use of the wife, and if there should not be any issue of the marriage, then in trust for the wife, her executors, administrators, and assigns, in case she survived the husband, but if she should not survive him, then to the husband for life, then to her kindred, subject to her appointment among them. The wife having obtained a divorce, *held*, that she was entitled to the whole property.—*Fussell* v. *Dowding*, L. R. 14 Eq. 421.

3. A husband and wife, having power of appointment over personalty, in favor of the children of the marriage, appointed a part of the property to trustees, on such trusts as their son H. should by deed appoint with the written consent of his father, and after the decease of said father, with the consent of the trustees under said father's will, or as said H. should by will appoint; and in default of appointment upon trust to pay the income thereof for life, or until bankruptcy, insolvency, or assignment; and on the decease of said H., if his interest should not have determined, to his executors or administrators, as part of his personal estate; but if such interest should have determined upon the like trusts as would have affected the residue of the same share, if the same had been appointed in favor of H. only during his life, or until the period of such determination. *Held*, that H. took an interest for life, liable to forfeiture on bankruptcy or assignment.

By settlement, husband and wife had a life-estate in realty, with power of appointment among children, and in default of appointment, in trust for the children, subject to parent's life interest, in equal shares, to vest at twenty-one or marriage. The settlement contained the usual power of sale and exchange, but no trust for sale. A son reached twenty-one and died intestate. Afterwards the husband and wife declared that the shares of persons interested in money arising from any sale of the premises should be "of the quality of personal and not of real estate." The real estates having been sold at the request of husband and wife, *held*, a good conversion as against the heir of the deceased son, the power of the settlor remaining until the end of his life.—*Webb* v. *Sadler*, L. R. 14 Eq. 533.

4. A covenant in marriage articles to settle real estate "upon his [the husband's] issue by said J. [the wife]," must be construed as a covenant for strict settlement, and prevents the husband creating charges in favor of younger children.—*Grier* v. *Grier*, L. R. 5 H. L. 688.

See Legacy, 5; Power, 1.

Shareholder.—*See* Company, 1, 4.

Shop.

The defendant owned a hall containing accommodation for about one hundred cattle. Adjoining was an open yard with fixed pens, capable of holding fourteen hundred sheep, and in which sheep were penned until required in the hall for sale. The defendant's dwelling-house adjoined, and communicated with said yard, but not with said hall. *Held*, that sheep sold in said hall were not sold in the defendant's "dwelling-place or shop" within St. 10 Vict. ch. 14.—*Fearon* v. *Mitchell*, L. R. 7 Q. B. 690.

Solicitor.—*See* Privileged Communications.

Specialty Debt.

A daughter was entitled, subject to her father's life interest, to trust funds, out of which the trustees had power to advance £2000 on the father's bond. The trustees advanced the £2000 accordingly, and further sums on the father's promissory notes. *Held*, that the daughter was entitled to said £2000 on her father's decease, as against specialty creditors. Otherwise as to the other advances. —*Ferguson* v. *Gibson*, L. R. 14 Eq. 379.

See Advance; Appointment.

Stamp.

The presumption is, that a lost instrument requiring a stamp, was stamped, in the absence of evidence to the contrary. But

when the absence of a stamp at any time is proved, the *onus* is shifted, and it must be proved that the instrument was stamped.—*Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.

Statute.—*See* Payment; Power; Shop; Street; Succession.

Statute of Limitations.—*See* Limitations, Statute of; Partnership, 3.

Street.

A railway company owned a piece of ground situated between the company's station and the public highway, from which it was separated by a gutter only. On this land the appellant allowed his hackney carriage to stand without license, as required by statute. *Held*, that said ground was not a "street, road, square, court, alley, thoroughfare, or public passage," within the meaning of the act.—*Curtis* v. *Embery*, L. R. 7 Ex. 369.

Succession.

A testator died in 1850, having devised his real estate to trustees to accumulate for twenty-one years, and then to convey to his tnen heir general; if more than one, as tenants in common. The testator's heir died before the expiration of said twenty-one years, and four coheiresses took the property in 1871. *Held*, that said coheiresses "became entitled" to the property upon the death of said heir, so as to render the property liable to succession duty.—*Ring* v. *Jarman*, L. R. 14 Eq. 357.

Surety.

Four directors of a company gave their note for £2000 to a bank by way of security for any balance which might be due from the company to the bank. The company was ordered to be wound up, and the bank proved for £3659, receiving a dividend of £1000. The bank then recovered the amount of said note from the directors. *Held*, that said directors were entitled to such a proportion of said dividend as the amount of their note bore to the amount proved by the bank.—*Gray* v. *Leckham*, L. R. 7 Ch. 680.

Title.—*See* Common.

Tort.—*See* Judgment.

Trade-mark.

1. A trade-mark was allowed in the word "Leopoldshall," as denoting a peculiar kind of salt, though in fact the word was the name only of the mine whence the salt came.—*Radde* v. *Norman*, L. R. 14 Eq. 348.

2. When a manufacturer has produced an article of merchandise, calling it by a particular name and selling it with a particular mark, he has acquired an exclusive right to such name and mark. If the use of such name and mark has been adopted by another person than the inventor thereof to sell goods of inferior quality but similar appearance, so that purchasers may be misled, the inventor of the name and mark is entitled to relief by injunction.—*Hirst* v. *Denham*, L. R. 14 Eq. 542.

Trover.—*See* Judgment.

Trust.

The defendants were trustees under the marriage settlement and will of G., with power to invest in government or real securities; and under the will the trustees were not to be liable for involuntary losses. The trustees advanced money from the blended funds on mortgage of a hotel. The trustees had sent a surveyor to value the hotel, and in his report the surveyor valued the hotel at nearly double said sum advanced, but included the estimated value of the license in the valuation. The property was worth about three-fifths of the sum advanced. *Held*, that the trustees were personally liable for the sum so advanced.—*Budge* v. *Gummow*, L. R. 7 Ch. 719.

See Charge; Executors and Administrators, 3; Partnership; Settlement, 2.

Vested Interest.—*See* Succession.

Ultra Vires.—*See* Company, 2.

Will.

A testator, after directing that his trustees should carry on his business for a period not longer than until his youngest child should reach the age of twenty-one years, and should then sell his business if it was not previously sold, and directing the conversion and investment of his estate, and giving an annuity to his wife, empowered his trustees to apply so much of the income as they should think fit, as a common fund for the maintenance and education of his children, accumulating the surplus income in aid of the common fund, and the income and accumulations ultimately unapplied to follow the destination of the capital, whence the same shall have arisen. The capital to be divided equally among his children on reaching the age of twenty-one years (or marrying, if daughters). Certain advances already made, to be brought into hotchpot. *Held*, that the accumulated income should be divided equally among the children, they giving credit for sums advanced for maintenance and education, with interest, and for interest from the testator's death on advances made by him, the capital of which advances was to be brought into hotchpot on the division of the capital of the estate.—*Hilton* v. *Hilton*, L. R. 14 Eq. 468.

See Contribution; Devise; Executors and Administrators, 1, 2; Power, 1, 3.

Winding up.—*See* Surety.

Witness.—*See* Libel, 2.

Words.

"*All and every other the Issue.*"—See Devise, 3.
"*Dwelling-place or Shop.*"—See Shop.
"*For Default of such Issue.*"—See Devise, 3.
"*Free Occupancy.*"—See Legacy, 5.
"*From the Loading.*"—See Insurance.
"*Inherent Vice.*"—See Carrier.
"*Issue.*"—See Devise, 3.
"*Other.*"—See Devise, 3.
"*Shipment.*"—See Contract.
"*Should die without Issue.*"—See Devise, 2.
"*Street, road, square, court, alley, thoroughfare, or public passage,*" *&c.*—See Street.
"*Upon his Issue.*"—See Settlement, 4.

REVIEWS.

A Treatise on the Law of Injunctions as administered in the Courts of the United States and England. By James L. High, Counsellor-at-Law, Chicago. Callaghan & Co., 1873.

This seems to be a most useful book; we have not had time, however, as yet, to examine it critically. We will refer to it again at length.

The Law Magazine and Review. Butterworths, Fleet Street, London, May and June, 1873.

These numbers contain a variety of articles more or less interesting to us in Canada. The June issue is the best of the two. We hope to find room for some of them: our readers, however, would do well to subscribe, and then they can make their own selection.

American Law Review—Little, Brown & Co., Boston. April, 1873.

The Essays in this number are entitled Recoupment—Suits between Aliens in the Courts of this Country—Contract by Letter—The Hyperion's Cargo, a merchant shipping case—State Taxation of National Banks, &c. Then there are the usual digests of English and American reports, Book Notices, Summary of Events, &c.

AUTUMN ASSIZES, 1873.

EASTERN CIRCUIT.—THE HON. THE CHIEF JUSTICE OF ONTARIO.

PERTH	Tuesday	9th September.
PEMBROKE	Tuesday	16th "
L'ORIGNAL	Wednesday	24th "
CORNWALL	Tuesday	30th "
OTTAWA	Tuesday	7th October.
BROCKVILLE	Monday	20th "
KINGSTON	Monday	27th "

MIDLAND CIRCUIT.—THE HON. MR. JUSTICE WILSON.

PICTON	Wednesday	10th September.
NAPANEE	Monday	15th "
WHITBY	Monday	22nd "
BELLEVILLE	Tuesday	30th "
COBOURG	Monday	13th October.
PETERBOROUGH	Monday	27th "
LINDSAY	Wednesday	5th November.

NIAGARA CIRCUIT.—THE HON. MR. JUSTICE MORRISON.

OWEN SOUND	Tuesday	9th September.
BARRIE	Tuesday	16th "
MILTON	Monday	22nd "
HAMILTON	Monday	29th "
ST. CATHARINES	Tuesday	14th October.
WELLAND	Tuesday	28th "

OXFORD CIRCUIT.—THE HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

SIMCOE	Thursday	25th September.
CAYUGA	Tuesday	30th "
BRANTFORD	Monday	6th October.
WOODSTOCK	Monday	13th "
STRATFORD	Monday	20th "
BERLIN	Monday	27th "
GUELPH	Monday	3rd November.

WESTERN CIRCUIT.—THE HON. MR. JUSTICE GALT.

SANDWICH	Tuesday	16th September.
CHATHAM	Tuesday	23rd "
WALKERTON	Tuesday	30th "
LONDON	Monday	6th October.
ST. THOMAS	Wednesday	22nd "
SARNIA	Wednesday	29th "
GODERICH	Wednesday	5th November.

HOME CIRCUIT.—THE HON. MR. JUSTICE GWYNNE.

BRAMPTON	Tuesday	16th September.
TORONTO	Tuesday	14th October.

CHANCERY AUTUMN CIRCUITS, 1873.

THE HON. VICE-CHANCELLOR BLAKE.

TORONTO	Monday	November 3rd.

THE HON. THE CHANCELLOR.

WESTERN CIRCUIT.

GODERICH	Thursday	September 18th.
STRATFORD	Tuesday	September 23rd.
WOODSTOCK	Friday	September 26th.
CHATHAM	Thursday	October 2nd.
SANDWICH	Wednesday	October 8th.
SARNIA	Friday	October 17th.
LONDON	Tuesday	October 21st.
WALKERTON	Thursday	October 30th.

THE HON. VICE-CHANCELLOR STRONG.

HOME CIRCUIT.

OWEN SOUND	Wednesday	October 1st.
SIMCOE	Wednesday	October 8th.
GUELPH	Wednesday	October 15th.
WHITBY	Wednesday	October 22nd.
BRANTFORD	Wednesday	October 29th.
BARRIE	Wednesday	November 5th.
ST. CATHARINES	Wednesday	November 12th.
HAMILTON	Wednesday	November 19th.

THE HON. VICE-CHANCELLOR BLAKE

EASTERN CIRCUIT.

OTTAWA	Wednesday	September 6th.
CORNWALL	Monday	September 22nd.
BROCKVILLE	Thursday	September 25th.
KINGSTON	Monday	September 29th.
BELLEVILLE	Monday	October 13th.
PETERBOROUGH	Friday	October 17th.
LINDSAY	Wednesday	October 22nd.
COBOURG	Monday	October 27th.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 36th Victoria.

DURING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

Robert Heber Bowes.
Allan John Lloyd.
James R. Roaf.
John George Killmaster.
Isaac Baldwin McQuesten.

And the following Gentlemen received Certificates of fitness :

R. McMillan Fleming.
J. Bruce Smith.
J. George Killmaster.
James R. Roaf.
Allan J. Lloyd.
Isaac B. McQuesten.
Peter Cameron.
Rupert E. Kingsford.
Alexander Sampson.
Wickstead.

And on Tuesday, the 4th February, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

James Joseph Wadsworth, M. A.
Alexander Haggart, B. A.
Samuel Clarke Biggs, B. A.
Elliott Travers, B. A.
Julius Lefebvre, B. A.

Junior Class.

Charles H. Connor.
Thomas G. Meredith.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR AUGUST.

3. SUN. .. 8th *Sunday after Trinity.*

10. SUN... 9th *Sunday after Trinity.* Battle of Montmorenci, 1759.

14. Tues... Last day for Co. Clerk to certify amount of County rates to Local Clerks.

17. SUN... 10th *Sunday after Trinity.*

20. Wed.... Last day for setting down and giving notice of re-hearing in Chancery.

21. Thurs.. Long Vacation ends.

24. SUN... 11th *Sunday after Trinity.*

26. Tues... Prince Albert born, 1819.

28. Thurs .. Re-hearing Term in Chancery begins.

31. SUN... 12th *Sunday after Trinity.*

CONTENTS.

EDITORIALS:

Meeting of County Judges..... 225
Important Decisions relating to Admission as Attorneys..... 225
"The Bovill Patent"..... 225
Law of Arrest..... 226
Honour to whom Honour is due..... 226
Law Society—Easter Term, 1873..... 227

SELECTIONS:

Our Criminal Treatment and Prison Punishments..... 229
The O'Keefe Case and the Law of Libel..... 233
Funeral Orations..... 235
Signature to Negotiable Instrument obtained by Fraud..... 235

CANADA REPORTS:

Ontario:

Notes of Recent Decisions:

Practice Court..... 237
Common Law Chambers..... 237

ENGLISH REPORTS:

Chancery:

Taylor v. Taylor—

Partnership—Fiduciary relation—Deceased partner—Bill for an account—Parties—Statute of limitations..... 238

REVIEWS:

Taylor on the Investigation of Titles..... 240
Wright on the Law of Criminal Conspiracies.... 241
Blackwood's Magazine..... 243

LAW SOCIETY OF UPPER CANADA..... 244

THE

Canada Law Journal.

Toronto, August, 1873.

A number of the County Judges met in Toronto last month to discuss matters of interest in respect to their official duties. Much information was elicited and many doubts removed as to points of difficulty arising in course of practice. We are compelled to delay our report of their proceedings until next issue.

The Court of Queen's Bench in England have held in *Re Clements*, 17 Sol. J. 651, that upon the examination of any person to be admitted as an attorney, the examiners have the right and the power to investigate the moral as well as the legal and intellectual qualifications of candidates. It was held that the enquiry "touching *the fitness* and capacity of any applicant for admission" found in the Stat. 6 & 7 Vict. c. 73, sec. 15, embraced both moral and intellectual fitness. This decision is of consequence here, inasmuch as the same language occurs in the Act relating to attorneys-at-law: C. S. U. C., cap. 35, sec. 10.

Every law student has read the pleasant observations of John William Smith on the Statute of Frauds: how the great Lord Nottingham used to say of it, that "every line was worth a subsidy;" how it might now be said with truth that every line has cost a subsidy, and that every line, and almost every word of it has been the subject of anxious discussion. Lately a book has been published called "The Bovill Patent," being a collection of the summings-up and judgments in the litigation under the patent of the 5th June, 1849, granted to the late G. H. Bovill, for improvements in

the manufacture of flour. It is stated in this work that not less than £4,000 a word has been spent in discussing the meaning of the sixteen words: "My invention relates only to sucking away the *plenum* of dusty air forced through the stones." Wherefore, it may be said, that this innocent inventor has achieved a more expensive result than the gray-headed fathers of the law who enjoy the glory of having framed the Statute of Frauds.

LAW OF ARREST.

Vice-Chancellor Strong, shortly before vacation in the case of *McPhadden* v. *Bacon*, decided a matter which has apparently heretofore been undetermined in this Province, with reference to the law of arrest. The question came up before him as to the right of a resident in this country to arrest a citizen of the United States (who had come here for a temporary purpose) under the Con. Stat. U. C., cap. 24, secs. 5 and 8. From the affidavits it appeared that Bacon and Shier, two of the defendants, were executors; that a large sum had been found due by both to the estate, but that, as between the executors, Shier was primarily liable; that Shier had sold out his property and had gone to the States some years before, about the time the Master's report fixing his liability had been made, and had there become naturalized, and that Bacon had since paid the amount; that Bacon had thereupon commenced an action for such sum against Shier in the States, and that Shier had come to this Province on a visit, but for the purpose of getting evidence to be used in the United States suit. The application was made in the original suit against the executors, which the Vice-Chancellor thought might be done, and that one defendant could apply for a *ne exeat* or writ of arrest under such circumstances against another. The applicant for the writ, Bacon, swore that the defendant Shier was here merely for a temporary purpose, and that he believed he was about to return forthwith to the States, and would, unless arrested, quit Canada with intent to defraud Bacon of his claim against him. The learned judge referred to *Brett* v. *Smith*, 1 Prac. R. 309, as being the case nearest in point, but observed that in that case the main question had been left undecided,—Richards, J., at the close of his judgment (p. 318), observing: "As the question of arresting a defendant during a temporary sojourn in this Province, who states his residence to be out of this Province, by a person resident therein, for a debt contracted out of this Province, is one of considerable importance, and has not been before discussed, I should be glad to have it settled by the full court." He then held that no facts and circumstances appeared in the affidavits to shew that Shier was about to leave Canada with intent to defraud anybody—on the contrary, his intent in leaving was to return to his domicile, and that an arrest under such circumstances could not be supported under the statute.

HONOUR TO WHOM HONOUR IS DUE.

During a recent sittings of the English Exchequer Chamber, a little discussion occurred on a most delicate subject, involving no less than the determination of the question how the judges should be addressed by the bar. The *Solicitor's Journal* states what occurred as follows: "Mr. Holker, Q. C., who was arguing a case, in reply to one of the members of the Court, referred to the President for the day, who was Mr. Justice Blackburn, as 'my Lord.' That very learned judge immediately interrupted Mr. Holker, saying:—'You should not speak of me as "my Lord;" that is a title reserved for the three Chiefs. When you speak to one puisne judge of another, you should

say, not "as my Lord," but "as Mr. Justice so-and-so" observed; and it makes no difference that the puisne judge referred to happens to be presiding over the Court.'" The *Jonrnal* goes on to observe that a presiding puisne judge has no right to be spoken *of*, as "my Lord," though by a comparatively recent usage he is, whether presiding or not, spoken *to* under that title. It was only during the last century that the judges began to be addressed as "your Lordship." In the year books their title is "Sir," and we notice that an English Vice-Chancellor is always referred to in the reports as "His Honour." Mr. Foss records the fact that the worthy Serjeant Hill persisted throughout his life in keeping to the old style, and that he was the last counsel who refused to adopt the new fashion. But Woolrych refers to another Serjeant of later date who was equally conservative: Serjeant Williams (the editor of Saunder's Reports) reserved the title of "my Lord" for the Chiefs only. One of the puisnes, it is said, would sometimes interrupt him in his argument. In those days it was peculiarly the Chief's prerogative to stop a counsel. But the Serjeant could not tolerate interference from any inferior quarter. "*Sir!*" he would say, "I will answer your observations after I have replied to *my Lord.*" It is to be noted, however, that when judges are on circuit, they are all equally entitled to be styled "my Lord," for the reason, apparently, that then they are acting under a special Royal Commission. Dr. Johnson, in his "Journey to the Western Islands of Scotland," notes the practice, but assigns a different reason: "Lordship" he says, "was very liberally annexed by our ancestors to any station or character of dignity: they said, the Lord General, and Lord Ambassador; so we still say, my Lord, to the judge upon the circuit."

We incline to the opinion that none of our ancestors could surpass the liberality of Canadians in conferring titles of dignity on the judges. All the judges of the Superior Courts are indiscriminately "your Lordship," and the judges of the County Courts have fairly monopolized the less dignified style of "your Honour." So far as the bar is concerned, the style of address is fixed; any change, in the way of abating the high-sounding epithets, must come by suggestion from the Bench. We do not, however, propose to suggest any change. It may perhaps be as well in these democratic days to retain any usage which can at all assist in keeping alive a spirit of respect for the representatives of law and order.

LAW SOCIETY.

Easter Term—36 Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:—

Monday, 19th May.

The several gentlemen whose names are published in the usual lists were called to the Bar, received certificates of fitness, and were admitted as Students of the Laws.

The petitions of Messrs. Biggar, Vidal, Gordon, and Colville, were allowed.

The petition of Mr. C. J. Fuller, for call to the Bar under Act of Ontario Legislature, was presented.

Ordered that Mr. Fuller do pass the usual examination before next Term, upon payment of the usual fee of $100.

The Treasurer reported the result of the Intermediate Examinations.

Tuesday, 20th May.

The petition of Mr. W. C. Mahaffy was refused.

The abstract of balance sheet for the first quarter of 1873, was laid on the table.

Law Society, Easter Term, 1873.

Abstract of Balance Sheet for First Quarter of 1873.

Income.	$	c.	
Students' Notice Fees,...	110	00	
Certificate Fees.....	873	50	
Term Fees.....	64	00	
Attorneys' Exam. Fees..	600	00	
Students' Exam. Fees.. ..	450	00	
Call Fees.....	600	00	
Sale of Reports.....	399	60	
Government Allowance..	1500	00	
			$4597 10

Expenditure.	$	c.	
Salaries.....	2278	27	
Scholarships.....	120	00	
Call Fees returned.....	90	00	
Students' Fees returned.	80	00	
Reports.....	1886	99	
Hall.....	1318	43	
Library	414	82	
			$6188 51
Expenditure less Income.....			$1591 41

Outstanding Assets.	$	c.	
Cash	118	59	
Bank Deposits.... 17295		42	
Currency Debentures...	4000	00	
Special Deposit.....10200		00	
			$31614 01

The Report of the Examining Committee was received and adopted.

The Examining Committee for next Term was appointed.

Ordered that the usual fees be paid to the Auditors and Examiner.

Ordered that the Steward, Mr. Molloy, be paid the sum of one hundred dollars as a gratuity, and that he be allowed the same rate as formerly for attendance on lectures.

The question of providing Text Books for the use of Students was referred to the Library Committee.

The letters from Messrs. Willing & Williamson, and from Mr. Haynes, on the subject of a supply of books for the Library, were referred to the Library Committee.

J. T. Anderson, Esq., Q.C., was unanimously elected a Bencher in the room of J. B. Lewis, Esq., resigned.

The Treasurer was unanimously elected the Representative of the Law Society in the Senate of the University of Toronto.

G. M. Evans, Esq., was appointed Examiner for next Term.

Ordered that Mr. Rordans be paid one hundred dollars as a contribution to the Law List, and twelve dollars for twelve copies.

Saturday, 24th May.

This being the day for the election of Treasurer, according to the provisions of the statute of Ontario, 34 Vict. cap. 15, and no quorum being present, the Hon. J. H. Cameron, the present Treasurer, continues Treasurer by law for the ensuing year.

Wednesday, 28th May.

The Treasurer and Messrs. Patterson, Richards, McKenzie, and Moss, were appointed a Special Committee to agree upon the final arrangements for cancellation of the covenant with the Government, and the surrender of part of the Osgoode Hall lands to the Crown.

The Report of the Library Committee was submitted. The clause as to loan of books to students was rejected, and the remainder adopted.

The petition of E. George Patterson was allowed.

The Finance, Library, Reporting, and Legal Education Committees were appointed.

The Committee on Rules to stand as at present constituted, until next meeting.

The Report of the Law School was received and adopted.

Friday, 6th June.

The Treasurer being absent from Toronto, D. B. Read, Esq., Q. C., was elected Chairman.

A special meeting of Convocation was ordered for the 25th instant.

The application of Mr. Wicksteed for return of fees, was ordered to stand over until the Treasurer's return.

J. Hillyard Cameron,
Treasurer.

Osgoode Hall,
25th June, 1873.

SELECTIONS.

*OUR CRIMINAL TREATMENT AND PRISON PUNISHMENTS.**

A considerable amount of time was devoted at the International Prison Congress in London, last year, to the question of Isolation until the end of long sentences, as in Belgium—a matter of importance no doubt to the States which are now settling their principles of prison discipline. It is, however, almost needless for me to state that this question was disposed of in England upwards of twenty years since, after experiments carried out at Pentonville with a care and attention which could not be exceeded in any country. It will be noted that these experiments were not carried out by the prison officials only: they were conducted by experienced commissioners in conjunction with them; and I assert, without fear of contradiction, that the reports upon this subject were most exhaustive and most valuable. The result of these experiments led, as we all know, the Government to adopt the gradual modification of "Isolation" now carried out in the Public Works Prisons. The report of the Prison Discipline Committee, in 1850, based upon the most experienced evidence in the country, entirely supported the Government in this Act. There must be no mistake in our principles. We acknowledge the separate system to be the basis of all prison discipline, but in long sentences, such as those of penal servitude, it has been proved, both for the health of the criminal and for his proper training, that modifications are necessary as the sentence advances.

I submit that in the discussion at the Congress no arguments were adduced calculated to make us change our principles, and that Belgium was the only country having practical experience of "Isolation" for any very lengthened period of time, besides Philadelphia, was clearly shown. The feeling of the delegates themselves was evinced by the resolution recommending "Progressive Classification," which has been made a reality with us; and by its adoption we have found that not only the criminal is better prepared for his release, but that the public are more disposed to give him employment.

In order to carry out a system of "Isolation" to the end with our penal servitude prisoners (which experience has taught us to reject), we shall have to expend half a million in prison buildings, and to sustain a very heavy annual loss in the value of "prisoners' labour." Independently of cost, I need scarcely add that we are not likely to reverse a policy, which, after many years' experience, has proved most eminently satisfactory, and has met with the support of the highest and most experienced authorities on the subject.

There was much discussion in the Congress with regard to "Corporal Punishment" and "Penal Labour," as carried out in this country. In both cases it was, I think, evident that there was some misapprehension of the subject on the part of the delegates who shared in it. It is, I submit, necessary that this matter should be fully explained on our part, for our assumed practice has since been made the subject of severe comment on the part of some of the delegates. It may be possibly considered that explanation is unnecessary: but I cannot agree in this opinion, because we must remember that they were eminent and earnest gentlemen, selected in different countries for their practical knowledge of prison discipline, and considerable weight will very probably attach to their statements.

With reference to "Corporal Punishment," the arguments for the abolition of the power to inflict it were evidently based upon the assumption that it could be indiscriminately exercised. The speakers did not appear to realize the safeguards against abuse which exist in this country, namely, that it cannot be inflicted without magisterial sentence, approved by medical authority: and that the case must be recorded for the information of the Government inspector, who has also access to every prisoner at his periodical visits. I am confirmed in this impression by the fact that Mons. D'Alinge, the official delegate from Saxony (a gentleman of great experience and ability), in his memorandum on the "Penal Confinements in Saxony," dated 1872, informs

* This was a paper read at the National Associations, for the promotion of Social Science, by the Right Hon. Sir Walter Crofton, C. B.

us that corporal punishment with a rod, or thin stick, up to thirty strokes, and punishment on laths, under certain restrictions, can only be applied after mature consideration and deliberation of the functionaries. On referring to the definition of the word functionaries, they appear to be officials under the rank of governor.

It is right to add that M. D'Alinge states that in his own prison (Zuichar) this punishment had not been used for ten years.

But this is not the question; for in our own prisons I have known large establishments conducted for several years without having to resort to corporal punishment. The question is as to the retention of the power of infliction. Now M. D'Alinge is the gentleman who has protested in the *Times* very energetically but very courteously, against what he calls the barbarism of our punishments; I submit, therefore, that I am justified in assuming that he cannot be aware that corporal punishment is with us not dependent upon the deliberation of the prison functionaries, but is surrounded with highly responsible safeguards.

This meeting will agree with me, that the power is only used by the visiting justices in extreme cases, in which all other punishments, from experience, would fail, and for acts endangering the lives and limbs of their officers and fellow prisoners. Moreover, it should be known that the shower-bath, the collar, the strapping-chair, and other punishments of this class in use elsewhere, would not be tolerated in this country. Our ordinary punishments are restricted to privation of privileges, reduction of diet, and solitude for limited periods in light and dark cells. Irons are occasionally used, under the strictest regulations, in cases where it is imperative to prevent serious mischief by precaution.

A reference to the actual inflictions of corporal punishment in England will, I think, amply show that this punishment is only resorted to in the most exceptional cases. I observe that in Birmingham, with a prison population of 3742 in 1870, there was no corporal punishment. In Worcester, with 1742, there was no instance of its exercise, and in Gloucester there were only two instances in a prison population of 2086. In other gaols (excepting in cases in which great turbulence existed) the corporal punishments have been but few. I am very far from being an advocate of corporal punishment, but, after long experience, I believe the retention of the power, exercised only in very exceptional cases, is the means of preventing far worse evils.

Now, I pass to the subject of Penal Labour, which also appears to have been very imperfectly understood. It must have been the impression of those who spoke against it, that in England we advocate penal labour to the bitter end, and this was apparent from the observations made by M. Stevens, of Belgium, and some others. M. Stevens remarked, that if an indisposition to labour was implanted in prison, the prisoner, on release, would avoid labour; and this was his objection to penal labour. This observation was assuredly true, but it does not apply to our prison system. In England, we, above all things, desire by our system to implant a liking for industrial employments in the mind of the criminal before his release, and therefore we associate it in his thoughts as a privilege to be earned, and not as a punishment. The punishments we leave to be associated with penal labour, believing that the criminal's dislike to it may possibly prevent his returning to prison, but can in no way make him dislike the industrial employments to which he has attained by good conduct in prison, and which he should endeavour to follow on his release.

It will be seen that "Penal Labour" is thus utilized as a lever to industrial employment—it serves to deter, and thus proves exemplary to others—it serves to amend, because it is the stage of suffering held to be necessary by the highest authorities in all reformatory treatment.

I have always argued, and practical experience has convinced me that I am right, that with such a motive power judiciously utilized, even greater results from the industry of the prisoners may be expected to accrue than from an equal number employed from the beginning of their sentences in industrial occupations. Every experienced governor of a prison will realize the importance of obtaining the co-operation of the prisoner in his work, and the advantage of motive power. If my view be true, and my own experi-

hence as proved it to be so—we shall have made our punishment exemplary to others by penal labour—we shall have obtained the co-operation of the prisoner in his industrial work, and thereby given him a liking for it on his release; and we shall have improved the financial results of the gaol. We have some encouragement already in this direction, for the gaols reported as having the highest earnings use, I observe, the treadwheel and crank as "penal labour," as a motive power to industrial employments.

There were in the discussions in the Congress some errors with regard to these special forms of labour. The Government has not insisted upon their use, for the statute admits the use in addition, of shot drill, the capstan, stone breaking, or such other like description of hard bodily labour as may be appointed by the justices in sessions assembled, with the approval of the Secretary of State, as hard labour, 1st class, *i. e.*, "penal labour." It is true that in most of the gaols the justices have appointed the treadwheel and crank, for these machines were in many cases already in use; but it is quite wrong to assume, as many at the Congress assumed, that the labour need be necessarily unproductive; for in many cases the power is employed in sawing wood, breaking stones, grinding flour, and pumping water. The fact is, all the Committees which have examined into this subject had pointed out that mere "industrial work" was not the "hard labour" contemplated by Act 4 George IV. The late Sir Joshua Jebb stated very clearly to the Committees of 1850 and 1863 the intentions of this statute, citing authorities in support of his opinion. I cannot allow the re-committals just published in Mr. Kennaway's return to have any value, or I would call your attention to the fact that the lowest re-committals are, with one exception, found in gaols which use the treadwheel and crank as "penal labour," and make industrial employments a privilege.

I think I have said enough to show that although there may be exceptions, *aimless* penal labour (as supposed by some of the members of the Congress), is not the prison system of England, and never was the intention of the Government, which I maintain is clearly shown by its circulars to the magistracy with reference to the Prisons Act, 1865.

Very many years since an eminent man in conjunction with others drew up a plan of criminal treatment, which resulted in a statute. This plan was almost identical in principle with what I have termed the prison system of England. It was laid down by this statute that "hard labour" should be of a servile character, amounting to drudgery, either treading on a wheel, driving a capstan, &c., and that misconduct should be punished by whipping, &c.

The author of this proposal was John Howard, the Philanthropist, in conjunction with Blackstone and Eden, and the statute was 19 George III. 6, 74, the working of which Howard agreed to supervise. Concurrently with this penal provision, a minute classification was instituted; the earliest part of the sentence was made very penal, and the subsequent stages modified in severity—thus making ordinary industry a privilege. Gratuities were introduced, and much care taken with criminals after their liberation.

So much for some of the misapprehensions of the Congress.

It is, however, I think, a question for ourselves, and an important one, whether the want of uniformity in the hours of "penal labour," now permitted under the 34th clause, sch. 1, Prisons Act, 1865, is not a very serious evil. On reference to Mr. Kennaway's return, before alluded to, it will be noted that in some gaols prisoners are placed at hard labour, 1st class, or penal labour, for ten hours daily, and in others for six hours (the minimum period allowed by statute during the first three months), irrespective of conduct. It is possible under this clause for prisoners, however well conducted they may be, to be kept at "penal labour" for ten hours daily during a sentence of two years. Nothing could be worse than the exercise of such a power, so contrary to the principles of the statute, and to the expressed intentions of the Government; and such a possibility should no longer be allowed. The fact is, the permissive power in the statute in this respect is so great as to defeat its object, which was to promote uniformity. Judging from the practice in the majority of gaols, and taking that as indicative of the opinion of the majority of the justices, it would, I think, be better that the Secretary of State should fix six hours daily for "pe-

nal labour" during the first three months of every sentence of hard labour (the minimum period now required), with the proviso that industry and good conduct have been duly recorded in favour of the prisoner. Misconduct and idleness will thus entail on the criminal a longer period of "penal labour," which can be regulated and systematized by the justices. The industrious will have a strong and well-defined motive power to exertion placed before them, and a classification, which time will improve, and such as is now carried out in several gaols, will become the imperative result in all prisons. By these means, uniformity in carrying out sentences will be promoted, the treatment of shorter sentenced prisoners will be more nearly assimilated to those in the convict establishments, and the intentions of the Government be more clearly defined, and more satisfactorily developed.

I fear we cannot be sanguine as to the reformatory influences on criminals whose sentences do not exceed three months, for there is not sufficient time to bring them to bear. I believe, however, that by increasing the period of strict separation from fourteen days, which is now freely used under the 34th clause, sch. 1, to *one month* with a *very low diet for sentences of one month and under*, very beneficial results would accrue, morally and financially. It will be remembered by some present that, with others, I advocated this point during the passage of the Bill through Parliament; but it was considered advisable in the first instance to try the fourteen days. Granting that periods of three months' imprisonment cannot well be reformatory, it would certainly be desirable to pass at once from one month of sharp treatment, as advised, to periods exceeding three months, and when we consider the amazing number of re-convictions with short sentences to which the Liverpool magistrates have called special attention, we can realize the advantage of cumulative sentences which they advise.

Very little was said in the Congress about the treatment of criminals beyond the walls of the prison, but to us this subject has been all-important for many years. We were long since compelled to realize that prison discipline was but a part of this great question, although so interwoven with our external treatment of criminals, as in a great measure to be regulated by it. This is in part illustrated by our prison training, preparing criminals for employment on liberation, and by legislation in aid of discharged prisoners societies (25 & 26 Vict. c. 44), of which there are already upwards of thirty. There are many of us here who will remember that in our various discussions on prison discipline, and in our recommendations for the adoption of certain principles which were at last acceded to, we felt it to be our duty also to urge the adoption of police supervision, and of more stringent measures with regard to "habitual criminals." The Police Supervision Act, 1864, the Habitual Criminal Act, 1869, and the Prevention of Crime Act, 1871, show with what success—a success which has been very amply confirmed by the statements of the Home Secretary in Parliament on the 20th of February last, in introducing amendments of great value in the details of the Prevention of Crime Act, 1871.

At the commencement of my paper I have strongly urged the necessity of exercising great caution in accepting new theories on this important subject, until they have been tested by thorough examination. In this recommendation I am only asking for the same measure which was (I think rightly), meted to myself. Notwithstanding I had practical results to adduce, I was, in advocating improvements in prison discipline, police supervision, &c., in some of the large towns in England, invariably subjected to a very severe examination. There are several here who will also recollect the long and searching examination to which I was subjected by the Law Amendment Society before it supported my views. The adoption by the Legislature of stringent measures for the "prevention of crime" gives to our information with regard to criminals a value not yet possessed by any other country.

Germany has introduced a supervision by the police, based upon the system now in force in the United Kingdom. A perusal of the instructions for carrying it out evince a care and consideration of the subject by the minister, which does him much honour and his government considerable credit. It is, I submit, a satisfactory testimony to our own pro-

cedure to find that these steps have been taken by so thoughtful and able a people. But it will be remembered that we have also a "register" of "habitual criminals," and that the "Prevention of Crime" Act has placed them under certain disabilities which bring them specially under the knowledge of the police, and give to our statistical information a value which it has not before possessed. It will be at once obvious that no fair comparison could be drawn between statistics collected in such a manner and those of other States which have not equal cognizance of their criminals, for the conditions are unequal. As a test of the merits of prison systems, the figures would be worse than useless, for they would be entirely misleading.

It will be remembered that for many years I demurred to a comparison between the statistics of the Convict Departments of England and Ireland. In the latter country there was registration, police supervision, and a systematic communication by means of photographs and returns between gaols periodically made. In England, at that time, the information was based upon re-convictions which in some haphazard manner were brought under notice. As between ourselves and other States which do not register and supervise their criminals, there would be the same great distinction in comparative statistics. A good sample of the errors of "Negative Statistics" is afforded by the fact that at one time it was given in evidence to a committee that the hulk system reformed 80 per cent. The apparent elements of reform being card playing, singing, dancing, and drinking.

I have repeatedly pointed out that even when the conditions are equal, a great fallacy may exist in assuming that a small per-centage of reconvictions on a prison population is necessarily an indication of a good prison system. A good prison system will ultimately clear the gaol of those prisoners most amenable to amendment, and will leave behind, as its more permanent occupants, the residuum, or those who may be considered as almost, if not altogether, irreclaimable. Under these circumstances the per-centage of such a prison population will be necessarily high, although the system will have acted most beneficially in reducing the total number in the gaol by operating on those who are open to reformatory influences.

These are matters which will require the attention of the International Statistical Prison Congress, to be held in Brussels during next September.

In conclusion, I beg to express my hope that I have succeeded in explaining points about which there appeared to be some ambiguity in the Congress, and also in showing that although I hold a very strong opinion that we, so far as principles are concerned, are upon the right lines in our criminal treatment, we have still some work to do to develop these principles, which need not however be attended with difficulty, or be calculated to disturb our present control as magistrates.

THE O'KEEFE CASE AND THE LAW OF LIBEL.

The case of *O'Keefe* v. *Cullen* is not, perhaps, so important from a legal as from an ecclesiastical and social point of view; and, however interesting a discussion of its legal bearings might be, we are unfortunately not in possession of sufficient material to enable us to exhaust the subject. But it is not so difficult to extract from the reports which have been published the true nature of the action and the legal principles which it involves, the materials wanting to enable us to complete the examination being an abstract of the pleadings and a reliable report of the Chief Justice's summing up.

The cause of action arose out of two alleged libels published by Cardinal Cullen, the first a suspension and deprivation, and the second an interdict, and the whole question turns upon the relationship created between a man who becomes a Roman Catholic priest and his ecclesiastical superiors. Has a Roman Catholic Cardinal absolute power over a priest in matters pertaining to the Church, so that no form of suspension, deprivation, or interdict can be actionable as a libel? Chief Justice Whiteside, as we understand, ruled that whilst a priest owes due allegiance to his superiors, and indeed absolute obedience in matters ecclesiastical, he retains his rights as an individual, and if he be suspended in

terms which are libellous, he has a remedy the same in all respects as any other subject of Her Majesty.

The Cardinal by his pleadings traversed the publication, and pleaded the general issue. The Lord Chief Justice is reported to have directed the jury that it was for him to say whether the alleged libels were defamatory, thus leaving to the jury to find the bare fact of publication by the defendant—which, he told them, was proved partly by evidence and partly by admissions. The summing up of the learned Judge consequently amounts to this—that if in the opinion of the presiding judge an alleged libel is defamatory, the province of the jury is simply to find the fact of publication and to estimate the damages. This is obviously not the law, nor has it been the practice prevailing amongst the most eminent Judges before and after Mr. Fox's Libel Act. It has been well remarked by Starkie that that Act was declaratory, and when it provided that in the trial of indictments or criminal informations for libel, the jury should find not only the fact of the publication, but also whether the matter charged be or be not a libel, it must be taken as governing the procedure at civil trials. At page 203 of Folkard's edition of Starkie it is said, "whether the libel is the subject of a criminal prosecution, or civil action, it has been the constant practice in recent times for the Judge to define what is a libel, and then to leave it to the jury to say whether the publication in question falls within the definition. . . . It was the practice of Lord Denman in these cases, and also of Lord Abinger, to leave the question to the jury as to whether, under all the circumstances, the publication amounted to libel." The learned author then puts the only case in which the court is justified in withholding the case from the jury—namely, where it is perfectly plain that on the face of the record there is no libel. But most assuredly where, in the opinion of the court the matter complained of is libellous, the question is entirely one for the jury.

The familiar cases of *Parmiter* v. *Coupland*, and *Darley* v. *Ouseley* have decided that it is not misdirection on the part of a Judge to express his opinion as to the libellous nature of the publication in addition to leaving the proper questions to the jury—one of such questions being whether the alleged libellous matter is within the definition of a libel adopted by law. The learned Irish Chief Justice is reported to have said that it has been decided by the English Court of Queen's Bench that it was the duty of the Judge to tell the jury if the publication is actionable and the plaintiff entitled to a verdict. We do not know to what case the learned Judge refers, but it will be found, we think, in every case, where there has been judicial interference with the functions of a jury, that the ground of such interference has been that the matter complained of was not libellous. Such was the case of *Jenner* v. *A'Becket*, 25 L. T. Rep. N. S. 464, where the declaration was demurred to, and the court differed as to there being anything which could go to a jury. We cannot find in any of the cases, and we do not remember to have heard of, a jury being directed to find a verdict for a plaintiff in an action of libel. The only approach to such a position which we can conceive is where there is a justification, the libel being admitted, when under certain circumstances the Judge might direct that as a matter of law the evidence in support of the pleas would be no justification. But this could only occur under very unusual conditions.

The elaborate argument of Erskine in the *Dean of St. Asaph's* case, and the decision which followed, coupled with Fox's Libel Act, may be taken as showing convincingly the tendency of Parliament and the Profession to regard defamation as wholly a question to be disposed of by a jury. And as a matter of practice it is obviously far wiser to let the jury find one way or the other, so that if they find for the plaintiff the damages may be assessed, as in the case of *Laughton* v. *The Bishop of Sodor and Man*; and if the jury has gone wrong on a ground of law a verdict can be entered for the defendant without the ruinous expense and vexation of trying the whole matter over again. In this particular case it had already been attempted to get rid of the Cardinal's pleas by demurrer which the Chief Justice would have allowed. Being overborne by his colleagues in that matter he virtually rode over them and their judgment in directing the jury to find for the plaintiff, inasmuch as thereby he

treated the case as in effect undefended. This is a matter of so much importance, indeed of such vital consequences to every individual whose character is defamed, that the advisers of the Cardinal should not lose a moment in carrying the case into banco. We can anticipate nothing but a rule absolute for a new trial on the ground of misdirection.—*Law Times.*

FUNERAL ORATIONS.

The Americans seem to appreciate their great men far more than we do. Possibly this arises from the circumstance that they have no Westminster Abbey. We lose a great lawyer, or a great novelist; a letter is written to the *Times* suggesting that he should be buried in Westminster Abbey. He is so buried (or isn't according to conditions not affecting his reputation), and his works are then taken out from the library shelves and criticised with a gentlemanly spite frequently surpassing anything which appeared during his lifetime. English lawyers might lose their brightest ornament, and they would never think of assembling together and saying what they thought of him. The American lawyers have no sooner lost an eminent member of their profession than they convene a solemn assembly, and make funeral orations, and pass resolutions. Chief Justice Chase has thus been honoured, and the only part of the ceremony we don't quite understand is the passing of resolutions. A resolution is usually passed with a view of inducing somebody to do or not to do something. To say that a dead man was a great judge or a great statesman would seem sufficient without "resolving" that he was. It appears, however, that the records of the American Courts admit judicial epitaphs, for the last resolution passed in connection with the departed judge was this: "Resolved, that Joseph O. Glover, United States District Attorney, be appointed to present the foregoing resolutions to the United States Circuit Court for the Northern District of Illinois at its next meeting, with a request that they be spread upon *(sic)* its records." It is probably owing to our defective education that we don't appreciate the pathos of this. A judge who, one of the funeral orators tells us, will never be forgotten, and will go on living for ever in the memory of lawyers, hardly stood in need of having his virtues recorded in the books of a Circuit Court. However, we ought not to cavil, as we err considerably in the wrong direction. Therefore, we add only one remark. Funeral orations are not altogether the kind of speeches which lawyers are called upon to make, but for the benefit of those who may be so exercised, we quote the following from the speech of the Hon. Leonard Sweet:—"In personal appearance he was a marked man, and of strong frame, commanding voice, and almost overshadowing presence; and few men have equalled him in clearness, logic and force. During thirty years of public life, although standing most conspicuously before the country, and in a leadership which called forth the deepest malevolence, no man can remember the occasion upon which his integrity in pecuniary affairs was questioned." A man of "almost overshadowing presence," who stood "most conspicuously before the country"—and that country America—for thirty years, and was never charged with want of "integrity in his pecuniary affairs," certainly deserves to have his virtues recorded in the Circuit Court for the Northern District of Illinois.—*Law Times.*

SIGNATURE TO NEGOTIABLE INSTRUMENT OBTAINED BY FRAUD.

In the course of his judgment in *Foster* v. *McKinnon*, 38 L. J. Rep. N.S. C. P. 310, Mr. Justice Byles said: "We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed," and the learned judge then referred to a dictum of Chief Justice Parsons in a Massachusett's case, favourable to the view taken by the Court of Common Pleas in *Foster* v. *McKinnon*, as the sole authority having any real bearing on the point before the Court. It is not a little strange that in the year 1869 the question at issue in

the Common Pleas was *res integra*, and yet that within the four subsequent years the very point there decided has come up in no less than four different cases in the United States.

In *Foster* v. *McKinnon* the action was brought by an indorsee for value without notice of any fraud against an indorser. It appeared that one Callew, who was in fact the acceptor of the bill sued on, produced the bill to the defendant, and by representing to the defendant that the document was merely a guarantee for certain money required for the furtherance of a railway scheme, induced the defendant to put his signature after that of one Cooper, the first indorser. The defendant, who was a gentleman much advanced in life, never saw the face of the bill at all. In the absence of negligence the Court held that the defendant was not liable, and that he was entitled to a verdict on the plea traversing the indorsement. This decision has been followed in the cases of *Whitney* v. *Snider*, 2 Lans. 477, *Gibbs* v. *Lunabury*, in the Supreme Court of Michigan, 22 Mich. 479, and in *Chapman* v. *Rose*, in the Supreme Court for the second department of the State of New York. The Supreme Court of Iowa held a different rule in a case of *Douglas* v. *Matting*, 29 Iowa, 498; 4 Am. R. 238.

In *Chapman* v. *Rose*, the defendant, a farmer, was accosted in his barn by a "smart" person named Miller, who ostensibly came to do business about certain patent hay forks. The scheme was that the farmer Rose should give an order for forks, and also undertake an agency to sell them. With this object the farmer signed two documents, one supposed to be the order, and the other the contract for agency, and Miller left supposed counterparts with him. Some time afterwards Rose was sued by the plaintiff as indorsee for value of a promissory note, by which Rose had promised to pay Miller or bearer 270 dollars, and the defendant then discovered for the first time that he had not signed an order for hay forks but a promissory note. In giving judgment Mr. Justice Tappan said:—"The law merchant has been extended to all proper lengths for the protection of innocent holders for value of commercial paper not matured, but when the instrument is not commercial paper that protection ceases. The term 'commercial paper' may be held to include notes, bonds, and securities saleable in the market. In *Foster* v. *McKinnon*, 38 Law J. Rep. (N.S.) 310 (a recent case), the full bench of the English Common Pleas held that the defendant was not liable under circumstances similar to, but not so strongly in favour of the defendant as, the circumstances in this case; and Mr. Justice Byles remarks in the opinion that the party sought to be charged never saw the face of the bill (which had his indorsement); that its purport was fraudulently misdescribed; that when he signed one thing, he was told and believed he was signing an entirely different thing, 'and his mind never went with the act.' And he distinguishes it from that class of cases when the party, 'with knowledge,' writes his name across or upon a paper which is fraudulently used or diverted. Where the party sought to be charged by his signature shows that he never intended to put his name to any such instrument; that he was deceived as to its actual contents, and that he is not chargeable with laches, negligence, or misplaced confidence, which is negligence, he will not be held liable even to a *bona fide* holder before maturity. The reason is, that there is no contract where there is no assent, and it would be a perversion of terms to hold the instrument in question a contract, with all the facts stated. It had neither life, inception, nor validity."

At the time of the decision of *Foster* v. *McKinnon*, in spite of the very high authority of Chief Justice Bovill, and Justices Byles, Montagu Smith, and Brett, who composed the Court, there was some scepticism in the profession as to the soundness of the doctrine thereon determined. We think that the knowledge that in three cases out of four in State Supreme Courts in the United States that decision has been followed, ought to reconcile the dissentients to the ruling of the Court of Common Pleas. It must, we think, be admitted that the Courts of the United States are peculiarly strong in the law affecting negotiable instruments.—*The Law Journal.*

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

PRACTICE COURT.

Reg. v. Flannigan.

Certiorari to Magistrate to return conviction—Procedendo—Delay.

[Wilson, J., Mich. Term, 1872, and Hil. Term, 1873.]

A certiorari issued on 12th April, 1872, on motion of defendant to a Police Magistrate to return a conviction for selling liquor without license. This writ was returned on 21st May, in Easter Term, with conviction and recognizance, and both defendants appeared to it by taking out rules. The prosecutor then obtained a rule nisi to quash the certiorari and for a procedendo to the Police Magistrate. But up to this time there had been no motion to quash the conviction.

It was urged by defendant that he had all the term within which to move against conviction, and that as the proceedings were removed into the Queen's Bench they must be finally dealt with there.

Held, 1. That the proper practice is that an appearance to the certiorari should be filed in the Crown office, and the case set down on the paper, so that either party might move for a *concilium*.

2. That the defendant was in default in not having moved to quash the conviction, or set down the case on the paper.

Semble, that an affirmance of the conviction by the prosecutor is necessary to obtain the costs, and further, as this was not done, the court declined to estreat the recognizance.

A procedendo was awarded, it being thought more advisable that the Police Magistrate should enforce the conviction than the Court above.

Cooledge v. Bank of Montreal.

Time when execution may issue after revision of taxation, and generally.

[Wilson, J., Hilary Term, 1873.]

A party who has to pay costs on a final judgment on verdict, nonsuit, demurrer or otherwise in the ordinary course of a cause, is not entitled to any time to pay them, after proper proceedings had to entitle the other party to collect them, nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution, immediately after revision, without waiting a "reasonable time" for payment.

Smith v. Cronk.

Time for issuing execution for costs of day after taxation.

[Wilson, J., Hilary Term, 1873.]

Held, That a "reasonable time" need not be given in which to pay the costs of the day, &c., after taxation, but that the order, &c., may be made a rule of Court, &c., the day after taxation.

Macaulay v. Phillips.

Notice of trial—Given in name of partner of plaintiff's attorney—When required—Informal notice.

[Wilson, J., Hilary Term, 1873.]

A. and B. were in partnership as attorneys, A. being the attorney on record in this suit. Notice of trial was given in the name of B.

Held, that the notice was irregular only, and not a nullity.

A notice of trial is necessary to be given in a cause to be tried, however that cause may go down for trial, whether as a *remanet*, or put off from one assize to another by Judge's order, or taken down to trial by rule of Court, or Judge's order.

Semble, a notice of trial given in the partnership name would not be irregular, nor would a notice subscribed, "the plaintiff's attorney," without giving his name.

Tully v. Chamberlain.

Arbitration—Prejudiced Arbitrator—Revoking Submission.

[Morrison, J., Easter Term, 1873.]

The arbitrator appointed by one of the parties having refused to act, he appointed a new arbitrator, who formerly acted as his attorney, but not in this suit.

Held, That the submission must be revoked.

COMMON LAW CHAMBERS.

Reg. v. Yeomans.

Setting aside conviction—Variance between it and warrant of commitment

[Morrison, J., Feb. 7, 1873.]

On a motion to set aside a conviction and warrant of commitment on the grounds: (1) That the conviction was not in the Magistrate's office, but in that of the Clerk of the Peace; (2) that the conviction did not contain a clause of distress; and (3) that the conviction only warranted the imprisonment without hard labour, whereas, the prisoner had been committed *with* hard labour.

Held, That the prisoner must be discharged, but on the last ground only.

Reg. v. Firman.

32-33 Vict. c. 31, sec. 71, C.—Appeal from Quarter Sessions.

[Galt, J., Feb. 10th, 1873.]

The above statute, preventing applications touching the decision of a Judge at Quarter Sessions in appeal, not only refers to where an adjudication has taken place therein, but even to where the appeal has gone off on a preliminary objection to the right of entering it.

Worthington v. Boulton.

Amending writ of summons—Resealing.

[Mr. Dalton and Morrison, J., Feb. 20th, 1873.]

A writ of summons may, after its issue, be amended by substituting a new plaintiff, without an order, and on such amendment there is no necessity for resealing, nor need it appear on the copy served that such amendment has been made.

Reg. ex rel. Hannah v. Paul.

Quo Warranto—Disclaimer after issue of writ.—35 Vict. c. 36, O.

[Mr. Dalton, Feb. 27th, 1873.]

Held, That the effect of filing the disclaimer *after* the issue of the writ is much the same as doing so *before* its issue notwithstanding the above Act, and so operates as a resignation and puts an end to the suit, and defendant avoids the reference to the County Judge and the penalties under the Act.

Hunter v. Grand Trunk R. W. Co.

Certiorari from Division Court—Variance between declaration and claim in Division Court.

[Mr. Dalton, Feb. 28th, 1873.]

Claim in a Division Court for $40, for "detention of plaintiff by defendants, on a journey from Toronto to Detroit and back (journey occurring between 28th Nov., when he started from Toronto, and 3rd December, when he got back)." Removed by *certiorari* into the Queen's Bench, where declaration was on contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar considering the want of technicality in Division Court pleadings.

ENGLISH REPORTS.

CHANCERY.

Taylor v. Taylor.

Partnership—Fiduciary relation—Deceased partner—Bill for an account—Parties—Statute of limitations.

The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him and the representatives of his deceased partner; but he is liable to account for the partnership assets, and, in taking such account, the Statute of Limitations is applicable.

In the absence of fraud or collusion, or some other circumstances creating a privity between the parties, the only person who can file a bill against a surviving partner for an account of the partnership assets is the legal personal representative of his deceased partner.

Knox v. Gye *commented upon.*

[March 7, 1873, 28 L.T., N.S., 189.

The bill in this suit was filed by a son against his father's surviving partners for an account of the partnership assets. The facts were shortly these:

William Taylor carried on the business of a mustard, cocoa, and chocolate manufacturer in London, in partnership with his brothers Henry and John, from 1832 till July 1842, when he died intestate, leaving his widow and his only son, the plaintiff, H. G. M. Taylor, surviving him. In Jan. 1843 letters of administration were granted to the widow, and in 1844 she married a Mr. Syers, but both before and after her marriage with Mr. Syers she acted (as the plaintiff alleged) in the affairs of the administration entirely under the advice of the surviving partners. At the time when the letters of administration were granted to her she swore that her deceased husband's estate was under 6000*l.* in value, but, being told by the partners that she was mistaken as to the amount, she was resworn, and reduced the value to 300*l.* On this last occasion she deposed specifically, "that she had since the 1st June then last past, for the first time ascertained that upon the accounts being inspected and balanced, which they were as she believed, on or about the said 1st June, the firm wherein her deceased husband was a partner, was not in solvent circumstances or able to pay 20*s.* in the pound, either at the time of his death or of taking out the letters of administration; and consequently that his estate would not benefit from such firm." She then verified an account of the personal estate at 285*l.* Another account was deposited at the office purporting to be a stock account of the partnership, taken as of the 5th Sept. 1842, but only balanced on the 1st June 1844, in con-

sequence of the difficulty of arriving at the correct balance of a debt of 9765*l.* 11*s.* 1*d.*, owing by the firm to Mr. Syers. No other account of the partnership was ever rendered to Mrs. Syers.

The bill alleged that the firm was never indebted to Mr. Syers in the above amount, which was greatly in excess of the truth, if indeed the firm owed him anything at the death of William Taylor. The bill then stated a great number of facts connected with the business, and, *inter alia*, that the brothers had, since the decease of William Taylor, retained in their hands and employed a balance belonging to his estate, in the business (which they continued to carry on as "Taylor Brothers"), and had made large profits thereby.

The plaintiff attained his majority in September 1862, and he then applied to his uncles for an account of the partnership assets, and on their refusal to render one, he requested his mother (as the legal personal representative of William Taylor) and Mr. Syers to take proceedings to enforce them to do so. Mr. and Mrs. Syers, however, being advised that such proceedings would prove ineffectual, refused to comply with the plaintiff's request.

The plaintiff thereupon filed this bill in 1866, against his uncles and Mr. and Mrs. Syers, praying a decree for an account of all the dealings and transactions of the partnership of 'Taylor Brothers,' from the 23rd July 1841, and of the share and interest therein of his father; an account of the profits made by the brothers from the business since that date; for a receiver; and for a declaration that he was also entitled to two-thirds of the moneys to be recovered in the suit, and Mr. and Mrs. Syers to one-third.

The *Solicitor-General* (Sir George Jessell, Q.C.), *Dickinson*, Q.C., and *Westlake*, for the plaintiff, contended that the result of the evidence showed that the item of 9765*l.* 11*s.* 1*d.* was altogether fictitious. The partnership, instead of being, as the widow was informed, insolvent at the time of her husband's death, was in reality solvent. She was misled by the misrepresentations made to her by the surviving partners, who by their conduct had placed themselves in a fiduciary relation to her and the plaintiff. They were bound, therefore, as if they were trustees, to account to her, and, as she would not take proceedings against them, he plaintiff was entitled to sue them in her stead, and compel them to account. Further, the Statute of Limitations was, in the view of the case taken by the plaintiff, no bar to the relief sought by the plaintiff in the suit.

[During the arguments the *Solicitor-General* commented in terms of dissatisfaction on the decision in the case of *Knox* v. *Gye* (L. Rep. 5 E. & I. App. 656), as reported, which he submitted ought not to be considered as an authority in the present case.]

Amphlett, Q.C., *Osborne Morgan*, Q.C., *Lindley*, Q. C., *A. G. Marten*, *A. A'Beckett*, *Terrell Mozeley*, and *R. T. Reid*, (of the Common Law Bar), for the defendants, were not called upon.

The Lord Justice.—This case so far as I have heard it, is one of those which, though sometimes met with in this court, might well make people think that the Court of Chancery can do as much harm by ruining honest men as good by preventing and alleviating fraud. If the law governing this case is such as I suggested it to be in the course of the argument, it would be waste of time to go through the mass of facts, occurring some thirty or forty years ago, with which this case is loaded; and it would, moreover, be extremely hard on the other suitors to do so. In the first place, I entertain a very strong opinion that such a bill as this in the present suit is not maintainable by a person in the position of the plaintiff. I do not think it can be supposed for a moment to be correct that any one who thinks himself interested in the estate of a deceased partner can file a bill like this merely on the allegation that the legal personal representative appointed to represent the estate will not sue in respect of it. If one person could do it, ten or any other number might; and the result would be most disastrous to the defendants, who would have to meet some case or other which they might not by any possibility be able to answer. There may be, no doubt, cases in which, from the course of the dealings between the parties, otherwise strangers to each other, a privity has been created which might be sufficient to uphold a bill in some respects similar, perhaps, to this one. There may be cases in which the executors of a deceased partner would not be the proper parties to deal with the partnership assets of the testator. But that would be the result of special ingredients in the case, and would arise from the particular character of the transactions immediately in question. Here the plaintiff and the defendants are strangers to each other. Unless there is fraud or collusion or some other circumstance creating a privity between the parties, a plaintiff in the situation of the one now before the court has no valid ground on which to file a bill against the surviving partners. The ordinary course of proceeding is to institute a suit for the administration of

the estate of the deceased partner, and then if a proper case has been made out, a receiver would be appointed to get in the assets. But to allow it to be supposed that where the legal personal representative of the deceased partner has been advised that there is no case for her to go on with, another person—a mere stranger—can file a bill in her stead, is a doctrine so monstrous, and would lead to consequences so incalculable, that it is not too much to say it might even end in doing away with the Court of Chancery itself. Then, as to the application of the Statute of Limitations, the transactions here in question occurred so long ago as 1842. A person who was a partner in the business died in that year. The partnership consisted of three brothers, who commenced their business in a small or humble way. After the death of the one brother the others represented to his legal personal representative that there was not a farthing coming to her from the business; nay, more, that she might be liable to contribute in consequence of a very large deficiency, the result of losses in the working of the concern. The bill in this suit does not contain a single allegation that there was any untruth in those representations, or any fraud on the part of the surviving partners. The case of *Knox* v. *Gye* (*sup.*) decides that there is no fiduciary relation between a surviving partner and the representatives of his deceased partner; there are legal obligations between them equally binding on both. There is, in fact, a mere liability to render an account. In the present case the deceased partner died on the 23rd July 1842, and letters of administration were granted to his widow on the 24th Jan. 1843. That being so, the right to sue for an account, as from the death of the partner, then accrued to his widow. If any mistake has been made in the accounts the right to have them opened then accrued therefore to the administratrix more than thirty years ago. But she never questioned them, and the Statute of Limitations applies just as much between surviving partners and the representatives of their deceased partners as between any other persons. The Solicitor-General, in opening the present case, expressed some dissatisfaction with the report of the case of *Knox* v. *Gye*, but I have perused the report carefully since this case commenced, and I have never read a judgment with which I more entirely concur than that of Lord Westbury, not forgetting either his lordship's lecture on the use of metaphorical terms, or the peculiar views on the subject once taken by the Court of Exchequer. The law is that the right of a surviving partner to the partnership assets is absolute. The right of the legal personal representatives of the deceased partner is to an account merely of the partnership assets, and to the taking of that, as to the taking of any other account, the Statute of Limitations applies. I see nothing in this case to take it out of the ordinary rules. The bill in the suit contains no statement of any fraud or deceit on the part of the defendants. It is filed by a plaintiff who ought not to have filed it, who is in fact the wrong party; and it is so filed after an interval of time far in excess of the prescribed period. Under these circumstances the bill must be dismissed with costs. In conclusion, I cannot refrain from adding that I sincerely hope the authority of *Knox* v. *Gye*, and the principles of law thereby established will prevent the recurrence of any other suit at all resembling the present.

REVIEWS.

The Investigation of Titles to Estates in Fee Simple. By Thos. Wardlaw Taylor, M.A., Master in Chancery, &c. Second Edition. Toronto: Willing & Williamson. 1873.

The first edition of this little work, known to the profession as "Taylor on Titles," was received most favourably, and very soon ran out of print. A second edition was immediately called for, and comes to us much improved and enlarged, and with evidence of careful revision and increased learning and experience on the part of its most capable and painstaking author.

The thought of writing this book would seem to have been first suggested by the passing of the Act for Quieting Titles to Real Estate in 1865, at least it appeared shortly after the working of that Act had become somewhat familiar, and its provisions occupied a prominent position in the discussion of the subjects treated of. It must not, however, be supposed that the author was limited in his research and labours by the scope of that Act, as a perusal of the table of contents clearly shews.

The preface to the second edition states that a careful revision has been made in connection with the recent changes in the law affecting titles to real estate, such as the legislation relating to crown debts, wills, conveyances by married women, &c., &c. We

can well believe, also, that "the experience gained by the author while acting as referee under the Act for Quieting Titles has also enabled him to make a number of practical suggestions, and to add many important, but unreported decisions and rulings on cases arising under that Act, which it is exceedingly desirable the profession should be acquainted with, and over one hundred new decisions have been added to those commented on in the former edition.

Mr. Taylor adheres to the arrangement of contents then observed, nor could he have done better within the limits he has prescribed to himself; but our readers are so familiar with the book that it would be simply a waste of time to refer to it at length—indeed it is almost unnecessary for the publishers to do more than announce that a second edition is printed to cause a large and rapid sale of one of the handiest and most useful little books ever offered to the profession in this country.

It does not pretend to "supersede or even rival the more extended treatises of English writers," but it does in fact give safe, accurate, and, for most practical purposes, complete information upon the various subjects embraced in it. It is now an essential part of the library of every lawyer in Ontario, and it will probably also command a large sale in the English speaking Provinces of the Dominion.

The book is a credit to the publishers in all that pertains to their department, and it would be difficult to distinguish the mechanical part of it from a law book published by any first-class English publishing house.

The Law of Criminal Conspiracies and Agreements. By R. S. Wright, of the Inner Temple, Barrister-at-Law, Fellow of Oriel College, Oxford. London: Butterworths, 7 Fleet St., 1873. Price, 4s. sterling.

This is a new book on an old subject. The author has not deemed it necessary, in making his bow to the public, to say why he has written on the law of Criminal Conspiracies. We have, however, a right to assume that his aim is to instruct in the branch of the law which he has chosen, and to do so to more advantage than any of his predecessors. If we are to judge of his purpose by the phrase taken from Lord Bacon's Elements, and published on the title page of the book, it is "to reconcile contrarieties."

The work opens with a general history of the law of Criminal Combinations. This the author divides into three periods, of which the first ends with the sixteenth century, and the second with the eighteenth century. He shows that during the first of these periods no conspiracy, confederation or combination was criminal except the crime of conspiracy as defined by the Ordinance of Conspirators, 33 Ed. I, as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracing or maintenance of various kinds. He shows that during the second period the strides made were considerable, till it was finally settled by the Star Chamber in 1611 in Poulterer's case, that although the crime of conspiracy, properly so called, was not complete, unless in a case of conspiracy for maintenance, some suit had been actually maintained, or in case of conspiracy for false and malicious indictment, one party, the party against whom the conspiracy was directed, had been actually indicted and acquitted. Yet *the agreement* for such a conspiracy was indictable as a substantive offence, since there was a criminal intent manifested by an *act* done in furtherance of it, viz., the agreement. He then shows that by an easy transition the agreement or confederacy itself came to be regarded as the offence itself, although the traces of the original distinction between a completed conspiracy and the mere agreement to commit it, long continued to be found. He then shows that during the third period, from 1800 to 1872, the most prominent characteristic of the law of conspiracy is its extended application to combinations of workmen. He refers to the 39 Geo. III, cap. 81; 39 and 40 Geo. III, cap. 106, and the 5 Geo. IV, cap. 95, the latter of which continued in force till 1871. He also adverts to the 22 Vict., cap. 34, on the course of the review. He points to the fact that in the discussions which took place under these statutes, the question was raised, and became the subject of doubt, whether in any and in what cases, combinations for purposes dealt with by the acts, or for other analogous purposes, are criminal at common law. He concludes this portion of the work by saying that "the effect

of the discussions and decisions is too doubtful to be stated here, but is attempted to be ascertained below." Then follows a long note of considerable historic interest, but not of much practical value.

The next division of the work appears with a dissertation "as to the kinds or purposes of criminal combinations." These he sub-divides as follows:

1. Combinations to criminal conspiracy, properly so called, within the meaning of the ancient ordinances of conspirators.
2. Other combinations expressly prohibited by Statutes now in force.
3. The rule of the seventeenth century that combination for any crime is punishable.
4. The question of a wider rule.
5. Combinations against government.
6. Combinations to prevent or defeat justice.
7. Combinations against public morals and decency.
8. Combinations to defraud.
9. Combinations to injure people otherwise than by fraud.
10. Combinations relating to trade and labor.
11. Lord Denman's antithesis.

In each class he examines chronologically the different cases that come under the class. This he has done with much succinctness and ability. The gradual expansion of the law with the growth of society is ably illustrated. He deals roughly with Lord Denman's antithesis, viz., "Conspiracy consists in the combination for accomplishing an unlawful end or a lawful end by unlawful means." He says that it was invented by Lord Denman to express the very opposite of that for which it is sometimes cited, and points out that in 1839, when Lord Denman's own phrase was attempted to be used before him as containing a definition of what combinations are criminal, he said, "I do not think the antithesis was very correct." And again in 1844, when the attempt was repeated, he explained the meaning of the phrase as being a limitation and not a definition, by the observation, "the words '*at least*' should accompany that." He points to other cases where the alleged definition when applied to the touchstone of experience utterly failed to act as a definition, and concludes this interesting chapter with the cutting remark that "an expression cannot be the definition of a conspiracy, the defining part of which is itself so devoid of definiteness for the purpose for which a definition is required."

The next division of the work treats of the act of combination. The author begins this section by stating that "every crime consists of a state of intentionality —some form of intention or of carelessness—and an overt act or omission to perform a duty." He then proceeds to the discussion of what "over act will suffice." In this he takes a very wide range, quoting not only cases decided in England, but referring to the laws of Scotland, France, Belgium, North Germany, Bavaria, Austria, Holland, Italy, British India, United States, and Canada.

His reference to the law of Canada (taken by the way, from the dictum of a Lower Canada Judge) is not very happy. It is as follows: "By the common law, as it is interpreted in Canada, according to a recent Canadian work, Clarke's Criminal Law, 1872, p. 401, 'a conspiracy is an agreement by two or more to do or cause to be done an act prohibited by penal law, or to prevent the doing of an act ordained under legal sanction, by any means whatever; or to do or cause to be done an act, whether lawful or not, by means prohibited by penal law,' *Reg.* v. *Roy.* 11 L. C.J. 93, per Drummond, J. This definition of Mr. Justice Drummond is certainly open to the objection that it wants definiteness. But those who know Mr. Justice Drummond will not be surprised to learn that he has not succeeded where Lord Denman failed, that is to say, in giving a definition of Criminal Conspiracy, sufficiently comprehensive, and yet sufficiently accurate to embrace all cases, and none but such cases as in law create the criminal offence.

The author concludes his work by a statement that the uses in common law of the doctrine of the criminality of agreement are of the following kinds and subject to the following limitations.

1. Its principal function is that of a general auxiliary to law, creating particular crimes.
2. In some cases it may be proper to treat the agreement for a minor offence, as so altering its quality and mischief, as to make it a fit object for punishment as a crime.

3. There are some mischievous conditions of things, such as an unlawful assembly, which ought to be punished as crimes, and which cannot be brought about except by the concurrence of more persons than one.

4. There may be cases in which acts done by several persons in agreement ought to be punished, although the same acts ought not to be punished if done without agreement.

5. In an imperfect system of criminal law, the doctrine of criminal agreements for acts not criminal, may be of great practical value for the punishment of persons for acts which are not, but which ought to be, made punishable, irrespective of agreement, and especially for some kinds of fraud; but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such a power ought to be carefully guarded, since the legislature admits its own inability to devise the principles on which legislation ought to proceed.

The author of this little work exhibits much originality, and boldness, though in some places there is an obscurity which may partly be accounted for by the very nature of the subject. His effort to discover the principles which underlie the law of Criminal Conspiracy, as supposed to be understood and as really administered in England, is deserving of much praise. But, unfortunately, the exigencies of society at times are such, or supposed to be such, as to demand departure from previously recognized principles. These "new departures" are not more frequent in the branch of law treated of by Mr. Wright, than in other branches of criminal law. Judges, too often, when acting under the serious belief that they are expounding the law, are really making new laws. Hence the growth of one particular branch of law into many ramifications. The root several centuries since may have been small and easy of discernment, but like the mustard tree in the gospel, its branches are now so mighty that the fowls of the air dwell therein. It is not, therefore, to be wondered at that a gentleman who has endeavoured from the root to trace the branches, should, after the lapse of several centuries, to some extent find himself "*in nubibus.*"

In a second edition we shall hope to see an Index which is wanting in this.

Blackwood's Magazine—Leonard Scott Publishing Company—140 Fulton Street, New York.

We presume that every being must be fed with that food which best suits its organization. Some, indeed, seem to thrive on poison, so at least we might suppose, from the quantity they consume—some weak creatures, on the other hand, become daily more so by a plentiful supply of pap—others again seem to have the digestion of ostriches, and thrive on steel filings. These things are well in their way, but for our part we prefer something that partakes of the excellencies of each.

Our legal reader who has now enjoyed four weeks of his summer vacation, and may therefore be supposed to be gradually recovering from the comatic state of utter exhaustion, superinduced by his violent exertions on behalf of ungrateful clients, will perhaps perceive that we speak of food, not material but mental.

Blackwood is neither poison, pap, nor steel filings, but, providing food for the craving and relaxation for the weary, gilds its intellectual pills in such a manner as not to frighten those who have but a spark of intellect left which can be fanned into a brighter blaze.

The July issue now before us, is a "specimen number." All we miss, and we thank our stars that it is so, is the usual political article which generally concludes each part. The novel reader has as much as is good for him in the eighth book of "The Parisians." The intelligent observer and charming writer who produces the series of articles on French Home Life, gives us a review of marriage as made and understood in the typical nation of the great Keltic family. Spain now struggling to throw off the deep sleep of ages, is spoken of in an article describing the celebrated Guerilla Chief and Curé, Santa Cruz. We applaud especially, however, the attempt of a writer in an article headed "Newfoundland" to enlighten the minds of his countrymen on Colonial subjects. We fondly hope that before the close of another century, the crass ignorance of Englishmen as to matters transpiring beyond the length of their noses, when that organ is pointing in a westerly direction, will disappear. The other articles are, "The Four Ages;" "The Rate of Discount," and "Alexander Dumas."

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.

No. 1268. James Stafford Kirkpatrick.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrick.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatchard.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. I., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR SEPTEMBER.

2. Tues .. Capitulation of Sedan, 1870.
4. Thurs. . French Republic proclaimed, 1870.
7. SUN. .. 13*th Sunday after Trinity.*
9. Tues. .. Sebastopol taken, 1855.
14. SUN... 14*th Sunday after Trinity.*
17. Wed... First Upper Canada Parliament met at Niagara, 1792.
21. SUN... 15*th Sunday after Trinity.*
28. SUN... 16*th Sunday after Trinity.*

CONTENTS.

EDITORIALS:

Baron Martin's Retirement 245
County Judges' Salaries 245
Appeals from the Court of Revision 245
Lord Westbury 245
The Admission of Barristers to Foreign Bars 246
Passages at Arms between Editors 246
New Law Books 246
Meeting of County Judges 247
New Ontario Election Act 249
Criticisms on the Reporters 249

SELECTIONS:

Foss and his "Biographia Juridica" 251
Lawyers' Incomes 256
The Law of Clubs 258

CANADA REPORTS:

Ontario:

Notes of Recent Decisions:

Common Law Chambers 259

Assessment Cases:

Appeals from the Court of Revision—
Assessment of Bank Stock 259
In re Pain v. Town of Brantford—
32 Vict., cap. 36, sec. 63—Assessment Appeal 261

ENGLISH REPORTS:

Chancery:

Booth v. Alcock—
Light and air—Lessor and lessee—Grant of lights—Injunction 263

Court of Queen's Bench:

Reg. v. Castro—
Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defence—Vituperation of judge and attack upon witnesses—Privilege of members of parliament—Fine and imprisonment 264

REVIEWS:

Revue Critique 271
Les Ans Du Roy Richard le Second 271
The Practice of the High Court of Chancery 272
Cunningham's Reports 273
Sir George Cooke's Reports 274
Sir Robert Brooke's New Cases 275
Ontario Law List 275

LAW SOCIETY OF UPPER CANADA 276

THE

Canada Law Journal.

Toronto, September, 1873.

It is rumoured that Baron Martin will shortly leave the Bench, owing to the deafness with which he has recently been afflicted. Mr. Hawkins, it is said, will probably be his successor.

County Judges will, as appears by a recent notification from the audit office, receive their salaries monthly instead of quarterly as heretofore; a change which will doubtless be found convenient to many. If the notification also stated that they, as well as the Superior Court Judges, should hereafter receive double their present emolument, we do not think the country would in the long run suffer any loss.

The Assessment Act of 1868-9 requires that a person dissatisfied with the decision of the Court of Revision may appeal therefrom by serving a notice of appeal upon the Clerk "within three days after the decision:" (sec. 63). It has been held by several of the County Judges, following the ruling of Judge Gowan, of the County of Simcoe, that the three days should count from the time of the particular decision and not from the day of the close of the Court of Revision.

Lord Westbury, formerly known as Sir Richard Bethell, whose death has recently been announced, was not only a powerful and sarcastic advocate, but is said to have been the greatest lawyer of his generation. The force of his extraordinary learning and intellect and remarkable judicial aptitude, as evinced both formerly as Lord Chancellor and more recently in the European Assurance arbitration, was gradually drawing him upward

from the partially retired position which he has occupied since dragged from his lofty position by an unworthy son.

As an item in connection with the gradual assimilation of the laws of the various confederated Provinces, we notice that several Nova Scotians are, and have been studying in this Province, intending, when called to the Bar, to return to their native Province. One of these (Mr. Sedgwick) has returned to Halifax to practice. It would appear that he had to obtain a private Act of Parliament, at the last Session of the Local Legislature, authorizing his admission to the Bar of Nova Scotia, as by some careless legislation in 1872 the statutes providing for the admission of British and Colonial barristers had been repealed. We believe, however, that the law has recently been so amended that English barristers, and barristers of those Provinces that extend similar privileges to members of the Nova Scotian Bar, can now be admitted to the profession in that Province, without a previous course of study there. It may some day become a question to discuss whether complete reciprocity in this respect should not prevail in all the Provinces of the Dominion.

There have been some amusing passages at arms between the "grave and reverend" editors of the *Law Magazine* and *Law Times* anent the Judicature Bill. The latter criticised sharply some observations of the former, and described their argument as "twaddle." The *Law Magazine* then retorted by accusing the *Law Times* of a fulsome attempt to pay a high compliment to Lord Selborne at their expense. "We have known," says the *Law Magazine*, "ill-behaved children at school try to curry favour with the schoolmaster by informing him of some uncomplimentary statement made concerning him by some one of their fellows. The *Law Times* seems to be endeavouring to approach the Chancellor and say, 'Please, Lord Selborne, the *Law Magazine* says you are an uninformed person.'" Thereupon the *Law Times* shifts its ground and makes some caustic remarks upon the following observations of the writer of an article in the *Law Magazine* for July, wherein it is stated; when speaking of the penalties of the law, "Justice is dependent upon evidence, and if evidence is false, and the falsity is of such a nature that it cannot be discovered, some seeming injustice will there and then be done, for the judges thus deceived will, according to law and justice, inflict a penalty on one whose self-will has not been opposed to the universal will, who has not committed crime. He does this, even though he may be unaware of the fact, that he may give back to the criminal the free will he has parted with to do him a justice and a right, and where he does this, deceived by the false words of many witnesses, he tries to give a man back that which he has not lost, and, therefore, he does that which is unjust, but what is nevertheless inevitable." We feel almost as impressed with the mysterious profundity of these two long paragraphs as the bewildered editor of the *Law Times*.

NEW LAW BOOKS.

Several legal works by Ontario barristers have been or will shortly be issued from the press. We have recently reviewed Mr. Taylor's book on Titles, and we have now before us a work on the law of insurance as applicable to Canada, by Mr. S. R. Clarke, already favorably known to the profession by his book on the Criminal Law. Mr. R. T. Walkem, of Kingston, has in the press a treatise on Wills, which cannot but be most acceptable in the altered state of the law on this difficult subject. We have good reason to think that the author will do his work well. Mr. Ewart (of Ewart's Index to the

Statutes) is compiling a book on Costs, which is much wanted by students and practitioners. McMillan on Costs, though in many respects defective and occasionally inaccurate, sold well and was found useful. Mr. Harrison has in the printers' hands, and now nearly completed, another edition of his Municipal Manual, rendered necessary by the recent Act. We fancy this must have rendered necessary a re-casting of the whole work; but however this may be, we do not doubt but that the proper course has been taken. We should counsel its being kept back for a few months to see what further changes the Ontario Legislature may make. It will be strange if they do not make some. Mr. Cooper has continued his Chancery Digest by a supplementary volume, which is said to be much superior to the first one, which was not all that could have been desired. It is not given to every man to know how to make a Digest. But this brings us to the last book on our list, which is by far the most important one of them all—the much wanted, long promised, and patiently waited for Digest by Mr. Christopher Robinson, Q. C. We fancy we already see the hard worked lawyer actually gloating over this book, for will it not save him, day after day, hours of weary labour. It will contain all the cases "from the beginning of the (Upper Canada) world" to the present time, thus superseding and practically rendering waste-paper the labours of Mr. Harrison in "Robinson & Harrison's Digest," the labours of Mr. Henry O'Brien in "Harrison & O'Brien's Digest," and that of Mr. Cooper in his "Chancery Digest" and supplemental volume. We understand that this new digest by Mr. Robinson, in the preparation of which Mr. Frank Joseph has been assisting him, will be in the hands of our readers before Christmas. The sooner the better.

MEETING OF COUNTY JUDGES.

Complaints have been made, and not without foundation, of a want of uniformity in the rulings of County Judges, leading to much inconvenience and bringing the administration of justice into disrepute by reason of a lack of that certainty which is the essence of law and order. Let us look at the causes of the evil and the most available means of remedying it.

It may be, and we fear is the fact that in the selection of those gentlemen who preside over the local Courts a few mistakes have been made, and that some perform their duties in a perfunctory and unsatisfactory manner, not being equal to their position, whilst others again are all that can be desired, being of such ability, learning and industry, that they would sit with credit to themselves and advantage to the public on the Superior Court Bench. But the fact is, there is scarcely any inducement to men of the first rank in the profession to accept County Judgeships. The inadequacy of the salaries is in itself a sufficient reason in a new country where there is little inherited wealth, and families have to be provided for. When the best men at the bar can hardly be found to accept judgeships in the Superior Courts of law and equity for this very reason, it is manifestly absurd to expect them to retire to a county town on salaries barely sufficient to keep body and soul together.

But no matter how good a lawyer may be appointed, his position as a County Judge is necessarily peculiarly difficult. The principal difficulty is the want of attrition. They have not, as a rule, the advantage of hearing cases before them argued by counsel of the experience and ability of those who conduct cases at the Assizes or in Term. Neither have they the books to refer to that can be had in the Osgoode Hall Library. But above all they have no fellow Judge to consult

with on subjects of difficulty. Each Judge does, and in the new points daily arising in his multitudinous duties, each Judge must decide them according to what is right in his own eyes, without that "talking it over" which is so necessary to bring out the various points of a case, and to show it in its different bearings and aspects. Isolation, moreover, almost inevitably tends in the large majority of men to narrow the legal mind.

None feel these difficulties more than the County Judges themselves, and we are not therefore surprised to see, and are very glad to be able to chronicle the efforts that they are making (with some not very brilliant exceptions) to remedy the evil as far as it lies in their power to do so. Hence the meeting of County Judges to which we alluded in our last issue.

On the 24th of July last a large number of them met at Osgoode Hall, in the Convocation Room, which had been placed at their service for that purpose, and inaugurated a series of meetings which we cannot but think will have a most beneficial effect in the administration of justice in the Local Courts.

His Honor Judge Gowan presided. The fact of his being Chairman of the Board of County Judges would in itself entitle him to this distinction, but in other respects it was fitting that one who has for years thoroughly commanded both the confidence of his brethren and that of the public, should in this as he has done on other occasions, take a leading part in matters of law reform. To his influence, combined with the energetic action of the best of the County Court Bench is mainly due the organization of these meetings, and to his tact and management as Chairman is largely attributable the success of the meeting which has recently terminated.

Although much was done in the way of organization and preliminaries, it would be unfair to expect too much from that which is but a commencement. We take, moreover, some small share of blame to ourselves for not being in a position to detail more fully what did take place of a generally instructive character. We intend, however, in future to be better prepared to relate what may be useful to our readers, and in this matter we are promised the valuable assistance of the Judges themselves and their Secretary.

Of the various subjects brought before the meeting we may mention that discussions took place as to the practice under the Partition Act, and a conclusion arrived at that it should be settled by rules, and that suggestions as to these rules, and as to the fees of officers, &c., should be made to the Judges of the Superior Courts, and for this purpose a committee consisting of Judges Jones, McDonald and Hughes was appointed to draft rules and frame a tariff, &c.—As to which is the better mode of taking evidence under sec. 4 of the Married Woman's Real Estate Act of 1873, whether *viva voce* by the Judges, or by affidavit, and how the evidence should be perpetuated. —As to the meaning of the word "claim" in the Division Court Amendment Act of 1869, and the extent to which an attachment affects a debt due by the garnishee to the primary debtor, under that Act.—As to the practice to be followed in case of an appeal to a County Judge from the award of an Assignee under the Insolvent Acts.—As to the jurisdiction of the County Judges under 31 Vict. cap. 26.—As to the expediency of having a fixed salary to Surrogate Judges in lieu of fees, and as to which a committee consisting of Judges Gowan, McDonald, Hughes, Kingsmill, and Burrowes, was appointed to endeavor to obtain a practical result in that direction.—As to the proof of wills made in a foreign country, of real estate in Ontario, then being a resident executor, the others residing abroad, &c.

NEW ONTARIO ELECTION ACT.

Of the statutes passed during the late session of the Ontario Legislature, not the least interesting to the legal profession is that entitled "An Act to amend the Law respecting Elections of Members of the Legislative Assembly, and respecting the Trial of such Elections:" 36 Vict., cap. 2.

When the important reforms, which have been effected in the law of parliamentary elections during recent years, both in Great Britain and in this Province, were first made, many persons were of opinion that a standard of political purity was being aimed at, which it would be impossible to attain in practice. But as far as our experience of the working of the present Provincial Election Law has extended, those fears appear to have to a great extent been groundless; and the system so far has been largely successful in preventing corrupt practices, and reducing the expenses of elections. In addition, since in this, as in many other instances, our legal reforms have been preceded by corresponding legislation in England, we have had the advantage of being able to confirm the results of our own experience by observing the operation of similar laws in another country.

Those who have paid attention to recent election trials under the new system cannot have failed to observe that a conviction of the inutility of attempts to evade the law is taking possession of the minds both of candidates and of electors; and such a conviction is the best assurance of further improvement in the future. This alteration for the better may be attributed chiefly to the change in the tribunal before which election petitions are heard, and it cannot be denied that there is a strong antecedent probability that the law will be enforced with greater certainty and strictness by men, such as the Judges of the Superior Courts, experienced in the discharge of judicial functions, than by parliamentary committees, composed of avowed political partizans, who in many cases are destitute of legal training or experience. The fear of course is that, as "familiarity breeds contempt," so new modes of evading the law will be discovered which will be difficult not only to defeat, but may not be covered by the law as it stands.

The first six sections of the new Act are in furtherance of principles already adopted, and are intended to assist in remedying certain defects which have become apparent in practice. The remainder of the statute, with the exception of a few sections of minor importance, consists of new matter, and may be roughly divided into three heads, treating respectively of election expenses and accounts—the preliminary examination of parties and production of documents—and the mode of holding a scrutiny.

With reference to the opinions expressed by a certain class of people, that although all the statutory enactments that ever have been framed, or probably ever will be framed, both have and will fail absolutely to destroy mendacity and corruption at elections, yet to those statutory enactments we must look for aid in raising the tone of public morality in political matters—for the higher that tone is raised, the nearer is the destruction of mendacity and corruption approached.

We shall next month refer briefly to the more important sections of the Act.

CRITICISMS ON THE REPORTERS.

[CONTINUED.]

In the former paper we forgot to refer to Barnewell and Alderson's reports in their proper order. It was stated in the *American Law Review* that Alderson B. was not responsible for the reports in the first term of the first volume of these reports. The writer, however, observed that he had mislaid the reference to sup-

port this position. It is to be found in the language of Alderson B. himself, as reported in *Barrett* v. *Power*, 18 Jur., 156. We now proceed in alphabetical order with the remainder of the reporters.

Croke's Reports. "Much weight is due to the authority of Croke."—Per Mansfield, C., in *Simmonds* v. *Swaine*, 1 Taunton, 549.

Croke Car. and Croke Jac. "That was a period in which actions of slander had greatly multiplied, and it had become necessary to stop them, and without doubt, some of those decisions would not be supported at the present day."—Pollock, C. B., in *Tozer* v. *Mashford*, 20 L. J. Exch. 226.

Durnford and East's (Term) Reports. "These are distinguished for care and accuracy of finish, and a matchless propriety of style. They have never been surpassed for general accuracy, and the point and precision with which the essence of the decisions is abstracted in the marginal notes."—9 Law Mag., N. S. 340.

Dyer's Reports. "Of high authority." 29 Law Mag., 340.

Espinasse's Reports. "It was commonly said that Mr. Espinasse heard half his reports and reported the rest."—Per Pollock, C. B., in *Whyman* v. *Gath*, 17 Jur., 560.

"Not a book of high authority." Per Blackburn, J., in *Laycock* v *Pickles*, 4 B. & S. 497.

Hobart's Reports. "His book of cases commands the highest authority."—31 Law Mag., 94.

Lilly's Reports. "A book of no great authority."—Per Willes, C. J., in Willes, R. 29.

Lofft's Reports. "These are but of very slight authority."—Per Lefroy, B., in *Cardiff* v. *Piercy*, Ir. Cir. R. 520.

Modern Reports, Vol. vii. Said not to be of high authority,—in *Chorlton* v. *Lings*, 17 W. R., 291.

Modern Reports, Vol. xii. "The 12th volume is a book of no great authority."—Per Crampton, J., in *Kennedy* v. *Stewart*, 7 Ir. L. R., 424, n.

Mosely's Reports. "Mosely is not a book of very great authority."—Per Shadwell, V. C., in *Brown* v. *Lockhart*, 4 Jur., 168.

Maude & Selwyn's Reports. "These reports are less cited in practice than any other reports of modern times, in proportion to the period of time over which they extend."—9 Law Mag., N. S. 340.

Plowden's Reports. "I cannot be wrong in accepting the precedent as sufficient, when Lord Ellenborough in *Wain* v. *Warlters*, 5 East 10, said of Plowden's Reports, that better authority could not be cited."—Per Wilson, J. in *Attorney General* v. *McLachlin*, 5 Prac. R. 73.

Peere Williams "is a great authority—as a reporter a very learned person, and I believe a very accurate reporter he is generally allowed to be:" Per Lord Brougham in *Ex p. Aloo*: 11 *Jur.* 858.

Pollexfen's Reports. "His reports of arguments are of authority, having been revised by him after he became Chief Justice."—*Hawkworth* v. *Morgan*, Rowe R. 453. See also *Allgood* v. *Blake*. 21 W. R. 63.

In *North's* "Life of Guilford" it is said, "Pollexfen, since the Revolution, published a book of reports, as they are called, consisting chiefly of his factious arguments." Cited in Greenleaf's Over-ruled Cases, p. 382.

Ridgeway's Parliamentary Cases. "*Vincent* v. *Going*, 3 Ridg. P. C. 599, is only reported in a book of no authority." Per Walsh, M. R. W. *Davis* v. *Kennedy*, Ir. L. R. 3 Eq. 56.

Ryan & Moody's Crown Cases Reserved. "The statements of fact are always drawn up by the Judges respectively before whom the questions arise, and each judgment is understood to be settled by some member of the bench, usually Mr. Justice Bayley." 4 Law Magazine 16, n.

Skinner's Reports. "His reports are highly esteemed." Woolrych Serjeants, p. 522.

Strange's Reports. The passages in parenthesis are comments on the notes of the reporter. See Clark's Colonial Law, p. 8 4 n.

"As to authority, two cases in Strange have been cited on opposite sides. We will set off one against the other." Per Bramwell, B., in *Preston* v. *Danin*, 21 W. R. 128.

Taunton's Reports. "The 8th volume is of very little authority." Per Parker, B., in *Isberg* v. *Bowden*, 1 C. L. R. 725, note.

Vaughan's Reports. "The reports in that book are in general very satisfactory." Per Lord Cranworth in *Carlisle* v. *Whaley*, L. R. 2 E. & I. App. 419.

Vernon's Reports. In Greenleaf's "Overruled Cases" it is said, that Lord Kenyon, C. J. observed that it had been an hundred and an hundred times lamented that Vernon's reports were published in a very inaccurate manner. His notes were taken for his own use, and not intended for publication. Yet he was the ablest

man in his profession. Greenleaf, p. 148, and see also *Hadley* v. *Clarke*, 8 T. R. 266, and *Russell* v. *Russell*, 1 Moll. 526.

"The cases reported in the 2nd vol. of Vernon are very inaccurate. They were published after the death of Mr. Vernon, which may perhaps be the reason." Per Turner, L. J., in *Mornington* v. *Keene*, 4 Jur. N.S. 982, n.

"The cases in Vernon are not considered to be very accurate." Per Lord Cottenham in *Truelock* v. *Robey*, 11 Jur. 999.

Vesey (Junior) Reports. "When he reported Lord Thurlow's Cases, Mr. Vesey was a very young man, afterwards he became an excellent reporter." *Calhoun* v. *Thompson*, 2 Moll. 287.

Willes' Reports. "These were not published for more than half a century after the decision in *Omichund* v. *Barker*, 1 Wil. 84. The manuscript was furnished by the Chief Justice's grandson." Greenleaf's Over-ruled Cases, p. 531.

A defendant was indicted for keeping a house of ill fame. His defence was that he kept no *house* at all, but only a *boat*, and therefore did not come within the purview of the statute, which made no mention of such structures. He had a flat-boat very comfortably fitted up for the purpose to which he designed to put it, and in which, carrying his cargo of frail goods and damaged virtue, he was wont to navigate up and down the waters of the Mississippi, bringing his wares to any market where at the moment there seemed to be the liveliest demand, and rejoicing in the belief that he had fairly floated out of the reach of the criminal statutes. But the Supreme Court were unable to appreciate the subtle distinction which had seemed so patent even to the unskilled vision of this layman. They risked their reputations upon the decision that a *boat* was a *house*, vouched in poor Mr. Webster with his big dictionary to sustain their views, and punished the defendant summarily.—*Am. Law Review.*

As an illustration of what common law pleading is capable, we may mention that a cause is now pending in which no less than eighty-one pleas have been put upon the record.—*Law Times.*

SELECTIONS.

FOSS AND HIS "BIOGRAPHIA JURIDICA."

We need only refer to former numbers of this Magazine for a just appreciation of the late Mr. Foss's biographical sketches of the Judges of England.* In 1848 Mr. Foss commenced his labours, and in 1857 he had completed six volumes of his work, which in 1865 he brought to a conclusion in three more volumes. These volumes contained something more than memoirs; they traced chronologically the different incidents and changes in the courts of Westminster that occurred from the reign of William the Conqueror to that of her present Majesty, and gave an account under each reign of the judicial personages who then administered the law. The usefulness and importance of the work may be summed up in the words of the reviewer of these volumes.

'To have successfully supplied a chasm in the legal literature of England is no unenviable success. To have executed the task with such a depth and variety of research, with such vigilance, acuteness, judgment, and skill, as to set all future competition at defiance, and produce at once a perfect work in its kind, is assuredly high praise. This high praise, however, and nothing less than this, is fairly due to Mr. Foss. Hitherto Dugdale's Origines Judiciales and Chronica Series has been the only guide for the inquirer into the personal history of the Bench. But every one who has had occasion to consult that work must be aware of its manifold imperfections; its faults of commission and omission; its inaccuracies, misstatements, blunders, and general untrustworthiness. In the work before us, an almost perfect accuracy and fulness has been achieved by an almost unequalled labour of research. The Yearbooks and subsequent Reports, the State Trials, the Patent Rolls, the Close Rolls, the Baga de Secretis, the Pells Records, the stores of the State-Paper Office, the Lansdowne MSS., the Harleian MSS., and other MSS. in the British Museum, MSS. in the College of Arms, the Egerton MSS., the Petre Papers, the Paston

* "Law Magazine," Late Series, Numbers 11, 37 and 60.

and other family Papers, the Black Book of Lincoln's Inn, County Histories, Local Histories, Wood's Fasti, the Gentleman's Magazine, the Camden, the Chetham, and other Societies' publications, are some of the sources from which Mr. Foss collects his information. Accordingly the result is a mass of learning which, besides exhibiting multiplied points of interest to genealogists, antiquarians, and historians, not seldom throws light on questions of law, and especially questions of constitutional law. But it is principally as a companion to the Year-books and earlier reports, and abridgments and treatises, that the book will be found useful for the studies, and in the practice, of the bar.'

The present notice, besides a short account of the life of the author, has reference only to Mr. Foss's biographical dictionary.* This work, which is of the ordinary octavo size and printed in double columns, contains 800 pages, and no less than 1600 biographical sketches of judges. It is an abridgment of the larger work, being limited to the biographical portion only, but it comprehends every name therein introduced, with corrections, to which has been added the judges who have been appointed since 1864. The author in his preface gives a short account of the various alterations in the respective reigns, caused by the many changes in the administration of justice and the arrangement of the courts. This statement, though brief, explains the various designations given to the different judges at different periods; but in the larger work there is a full historical account of the courts, judges terms, counsel, the Inns, &c., with other interesting details.

To prepare such a volume as this must have been a task of no little magnitude. The names are arranged alphabetically, both as to family name and title. It is, therefore, easy of reference by either. The plan of the work is to trace, first, the pedigree of each person, then the professional character and appointments, and thirdly, the declining years and decease. In this way the result of a great deal of antiquarian research has, in each case, been brought together in a few words, and no pains have been spared to make the work a trustworthy guide to legal history.

Among the many details of the characteristics of the Bench is here and there a good joke, which the proceedings of the Court often occasioned. Baron Alderson, a great favourite with juries, and in his reasoning deep, solid and acute, had a great taste for witticism. Once a counsel on applying for a *nolle prosequi* pronounced the penultimate syllable long. 'Stop, sir,' said the baron; 'consider that this is the last day of the term, and don't make things unnecessarily long.' At an assize town a juryman said to the clerk who was administering the oath to him, 'Speak up, I cannot hear what you say.' The baron asked him if he was deaf, and on the juryman answering, 'Yes, with one ear,' he replied, 'Well then,' said the baron, 'you may leave the box, for it is necessary that a juryman should *hear both sides*.'

Justice Hayes, one of the three additional judges made on the passing of the Act remitting the trial of election petitions to the judges, joined with an amiable disposition a rare power of amusing his companions at the bar. His judicial career was lamentably short, dying almost in the exercise of his judicial duties in fifteen months. It is said of him—"He was, in fact, a man of 'infinite jest,' and if there had been an album kept in Westminster Hall, to recall the witticisms of the bar, many would have been the pages devoted to his witty pleasantries and whimsical pieces."

Justice Powell, Junior, was a profound lawyer, and much respected in private life. Dean Swift represented him—

"As the merriest old gentleman he ever saw, speaking pleasant things and chuckling till he cried again. When Jane Wenham was tried for witchcraft before him, and charged with being able to fly, he asked her if she could fly, and on her answering in the affirmative he said, 'Well, then, you may; there is no law against flying.' The poor woman was saved from the effects of her own faith, and received the Queen's pardon."

Going back above a century and a half, many stories are told of the quaint sayings of the administrators of the law, among which may be mentioned an anec-

* A Biographical Dictionary of the Judges of England, from the Conquest to the present time, 1066 to 1870. By Edward Foss, F.S.A., of the Inner Temple. London: John Murray. 1870.

dote of Baron Powys, who retired from the Bench at the age of seventy-eight in 1726. The biographer says:—

"With moderate intellectual powers, he filled his office with average credit, but was commonly laughed at by the bar for commencing his judgments with 'I humbly conceive,' and enforcing his arguments with 'Look, do you see.' He is the reputed victim of Philip Yorke's badinage who, dining with the judge, and being pressed to name the subject of the work which he had jokingly said he was about to publish, stated that it was a poetical version of Coke upon Lyttleton. As nothing would satisfy Sir Littleton (the Baron) but a specimen of the composition, Yorke gravely recited,—

"He that holdeth his lands in fee
Need neither to shake nor to shiver,
I humbly conceive; for look, do you see,
They are his and his heirs' for ever."

We might here have introduced the judgment of Sir John Pratt about the woman and her settlement, reported and preserved in a catch with which our readers are familiar.

Of Sir Thomas Richardson, who was appointed Chief Justice of the Common Pleas in 1626, it is said that while attending at the Assizes at Salisbury, a prisoner, whom he had condemned to death for some felony, threw a brickbat at his head; but, stooping at the time, it only knocked off his hat. On his friends congratulating him on his escape he said, 'You see, now, if I had been an *upright* judge I had been slaine.' The additional punishment upon this offender is thus curiously recorded by Chief Justice Treby, in the margin of Dyer's Reports (p. 188, b):—'Richardson, C. J. de C. B. at Assizes at Salisbury in Summer 1631, fuit assault per Prisoner la condemne pur Felony;—que puis son condemnation ject un Brickbat a le dit Justice, que narrowly mist. Et pur ceo immediately fuit Indictment drawn pur Noy envers le Prisoner, et son dexter manus amputé et fixe al Gibbet, sur que luy mesme immediatement hange in presence de Court.'

Justice Shelley, in the sixteenth century, seems to have been somewhat of a humourist on the Bench. In a case which he thought overlaboured beyond its merits he compared it to a Banbury cheese, which is worth little in substance when the parings are cut off; for so this case,' said he, 'is brief, if the superfluous trifling which is on the pleadings be taken away.'

Chief Justice Tindal greatly enjoyed a joke. It is related that:—

"One of the learned serjeants coming too late for dinner at the Serjeants' Inn Hall found no place left for him. While waiting for a seat, 'How now,' said the Chief Justice, 'what's the matter, brother? You look like an outstanding term that's unsatisfied.' Of another serjeant he was asked whether he thought him a *sound* lawyer. 'Well, sir,' said he, 'you raise a doubtful point, whether *roaring* is unsoundness.' When another stormy leader was addressing a jury in the civil court at Buckingham, he spoke so loud that the Chief Justice, who was delivering his charge in the Criminal Court, enquired what that noise was. On being informed that Serjeant —— was opening a case, 'Very well,' said he, 'since Brother —— is *opening*, I must *shut up*,' and immediately ordered the doors between the two courts to be closed. The following, though not strictly professional, will perhaps be deemed quite as good. When Lady Rolle, on her husband's death, refused to let the hounds go out, a learned serjeant asked the Chief Justice whether there would be any harm if they were allowed to do so with a piece of crape round their necks. 'I can hardly think,' said Sir Nicholas, 'that even the crape is necessary; it ought surely to have been sufficient that they were in *full cry*."

In days of yore dissipation was carried on to an alarming extent among the upper classes, and many of the brightest luminaries at the bar and on the bench were votaries to the prevailing vice. The last four of the Chief Justices of the King's Bench in the reign of Charles II. Scroggs, Pemberton, Francis, and Jeffreys, may be cited as remarkable proofs of the general profligacy of the period. The Bishop of Salisbury, author of the 'History of the Reformation,' seeing his son, afterwards a Justice of the Common Pleas, who was then leading a dissolute life, uncommonly grave, asked him the subject of his thoughts. 'A greater work,' replied he, 'than your lordship's "History of the Reformation."' 'What is that, Tom?' 'My own reformation, my lord.' The bishop expressed his pleasure, but at the same time his despair of it.

Lord Henley, afterwards Lord Chancellor, was another jovial and hilarious young man when at the bar. It is said of him that, having to apologise to a Quaker at Bristol for some indecent liberties taken in cross-examination of him at a trial, when he became Chancellor, he engaged him to pay the freight of some wine consigned to him, and afterwards invited him to dine at his table, where he good-humouredly related to the company the particulars of their early fracas.

Among the anecdotes that have reference to the early follies of Chief Justice Mott is the following, which shows that he did not hesitate to acknowledge them when the confession would serve the ends of justice:—

"In a trial of an old woman for witchcraft, the witness against her declared that she used a 'spell.' 'Let me see it,' said the Judge. A scrap of parchment being handed up to him, he asked the old woman how she came by it, and on her answering, 'A young gentleman, my lord, gave it to me to cure my daughter's ague,' enquired whether it cured her. 'Oh! yes, my lord, and many others,' replied the old woman. He then turned to the jury and said, 'Gentlemen, when I was young and thoughtless, and out of money, I and some companions, as unthinking as myself, went to this woman's house, then a public one, and, having no money to pay our reckoning, I hit upon a stratagem to get off scot-free. Seeing her daughter ill of an ague I pretended I had a spell to cure her. I wrote the classic lines you see, and gave it to her, so that if any is punishable, it is I, and not the poor woman." She was of course acquitted, and did not fail to receive from the judge a compensation for the trouble he had caused her. In none of the trials before him for this supposed crime was a conviction obtained, and prosecutions for it from this time fell into discredit, which was increased by his putting into the pillory one Hathaway, convicted of pretending to be bewitched by a poor woman whom he had indicted for the crime. Of the idle companions of his youthful frolics there is a melancholy tradition that it was his fate to have one of them tried before him and convicted of felony. The prisoner was afterwards visited by him in gaol, and to his enquiry after their college intimates, answered, 'Ah! my lord, they are all hanged but myself and your lordship.'"

A circumstance, not unlike the foregoing, occurred not many years ago at a trial before Chief Justice Jervis, whose social character and judicial powers were of the highest order, and who possessed a surprising memory in summing up the details of evidence.

"A young man of large property had been fleeced by a gang of blacklegs on the turf and at cards. . . . A private note-book with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over and explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in court, every one thought them to be so. They were handed to the judge. . . . When the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you, without looking at the faces, the name of every card upon this pack.' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths of flowers in dotted lines all over, there was a small flower, the number and arrangement of the dots on which designated each card.'"

Sir John Trevor, Master of the Rolls, it is said by Roger North:—

"Was bred a sort of clerk in the chambers of old Arthur Trevor, an eminent and worthy professor of the law in the Inner Temple. 'A gentleman,' he adds, 'that observed a strange-looking boy in his clerk's seat (for no person ever had a worse sort of squint than he had), asked who that gentleman was: 'A kinsman of mine,' said Arthur Trevor, 'that I have allowed to sit here to learn the knavish part of the law.' That he was bettered by the instruction may be doubted; but that he became an able proficient there is evidence in the reputation he gained of being the best judge in all gambling transactions, of the tricks and intricacies of which he had personal experience."

A ludicrous story is told of Chief

Justice Pratt. While on a visit to the Lord Dacre, in Essex, accompanied in a walk by a gentleman notorious for his absence of mind, he came to the parish stocks.

"Having a wish to know the nature of the punishment, the chief justice begged his companion to open them so that he might try. This being done, his friend sauntered on and totally forgot him. The imprisoned chief tried in vain to release himself, and on asking a peasant who was passing by to let him out, was laughed at and told he 'wasn't set there for nothing.' He was soon set at liberty by the servants of his host. Afterwards, on the trial of an action for false imprisonment against a magistrate by some fellow whom he had set in the stocks, on the counsel for the defendant ridiculing the charge and declaring that it was no punishment at all, his lordship leaned over and whispered, 'Brother, were you ever in the stocks?' The counsel indignantly replied, 'Never, my lord.' 'Then I have been,' said the chief justice, 'and I can assure you it is not the trifle you represent it.'"

Of the private character, social status, and legal and public reputation of the many learned individuals referred to, the volume abounds in description. Painful as some of the cases which have attracted notice of late, there were, among the ranks of the bar in days gone by, struggles equally formidable, and, no doubt, great learning was obscured and buried for want of opportunity of bringing out. The tide of fortune had not been taken at the ebb. Persevering industry appears to have been the order of the day among our forefathers. At the latter end of the eighteenth century and the beginning of the present, debating societies were thought more of, and many of our greatest judges owed their success in the profession in no small measure to the experience and reputation they gained in discussing questions of law in these places. Lord Kenyon, during his years of pupilage, occupied every instant of his time in study:—

'He lived in a small set of chambers in Brick-court in the Temple, and was constant in his attendance in Westminster Hall, where he began taking notes of the cases he heard there so early as 1753. The small means which his father could allow him obliged him to live with the greatest economy, by which he contracted a habit of parsimony which stuck to him to the last day of his life; and he was proud even in his prosperity of pointing out the eating-house near Chancery Lane in which he and Dunning and Horne Tooke used to dine together at a cost of 7½d. a head.'

An anecdote is told of the late Sir Frederick Pollock when a pupil at St. Paul's school under Dr. Roberts:—

"Fancying that he was wasting time there as he intended to go to the bar, he intimated to the head master that he should not stay; and that the doctor, who was desirous of keeping so promising a lad, thereupon became so cross and disagreeable that one day the youth wrote him a note, saying he should not return. The doctor, ignorant of the cordial terms on which the father and son lived together, sent the note to the father, who called on him to express his regret at his son's determination, adding that he had advised him not to send the note. Upon which the doctor broke out, 'Ah! sir, you'll live to see that boy *hanged*.' The doctor, on meeting Mrs. Pollock some years after his pupil had obtained university honours and professional success, congratulated her on her son's good fortune, adding, quite unconscious of the humorous contrast, 'Ah! madam, I always said he'd fill an *elevated* situation.'"

Francis North (Lord Guildford), whose uncle was treasurer of the Inn at which he was called, swept the admission fee into the new student's hat, saying, 'Let this be a beginning of your gathering money here.' But in order to make ends meet he had to relinquish the acquaintance of many of his fellows, whose habits were too extravagant for him, and took for relaxation his violin and practiced music, of which he was passionately fond.

Chief Justice Saunders commenced his career in the deepest poverty, his associates being of the lowest class. Having learnt to write he qualified for an attorney's clerk, and afterwards read for the bar.

Great and learned lawyers have existed in all ages, and we owe the basis of some of the greatest modern legal text-books to the learning of our ancestors. Speaking of Lyttleton our biographer says:—

"His name is still sacred in Westminster Hall, and his celebrated work, '*The Treatise on Tenures*,' which Coke describes as 'the most perfect and absolute work that ever was written in any human science,' and for which Camden asserts that 'the students of the Common Law are no less beholden than the civilians are to Justinian's Institutes,' will ever prevent its being forgotten. The treatise itself is, however, now seldom read without the valuable commentary of Sir Edward Coke, a production which, as no one would dare to enter the legal arena without fully digesting, has been illustrated successively by the eminent names of Hale, Nottingham, Hargrave, and Butler."

(To be continued.)

LAWYERS' INCOMES.

From time immemorial lawyers have been popularly regarded as an overpaid and greedy set of fellows; and many hard things have been said and written of their avarice and extortion. But as a rule they have never been, and are not now, well paid nor greedy nor avaricious. Much of this evil report has come from the jealousy usually felt by those compelled to do manual labor toward those who labor with their brain. We believe it to be a fact that the majority of those who have won the highest places at the bar have been remarkable for their liberality to their clients, and for carelessness of their own pecuniary interests.

Lord Bolingbroke, in a moment of despondency, said: "There have been lawyers that were orators, philosophers, historians; there have been Bacons and Clarendons, my lord; there shall be none such any more till, in some better age, men learn to prefer fame to pelf, and climb the vantage ground of general science." There is a grain of truth in this, for no lawyer can hope for "fame" or "pelf" either, who neglects to "climb the vantage ground of general science." But is it not asking too much to ask the lawyers to give up the "pelf" when all the rest of the world is racing for it? If they do their work honestly and thoroughly they are worthy of their reward. Fame is of course to be desired. To have our merits appreciated two or three centuries hence, long after what was once our mortal substance is "stopping a beer barrel," is a very pleasant notion to entertain; but one who labors for that alone is not unlike Verdant Green who, in a drunken freak, buried the college plate in the quadrangle "to provide for posterity."

An income of eight or ten thousand a year, *argent comptant*, carries along with it many solid advantages, and the lawyer who can command this has no reason to consider his a hard lot, because posterity may not assign to him, in the Temple of Fame, so lofty a niche as Milton occupies, who sold his Paradise Lost for £15, or as Rembrant tenants, who was obliged to feign his own death before his pictures would provide him a dinner. There is a deal of truth in that homely proverb, "Solid pudding is better than empty praise." The reputation which wins current value during life is more useful to the possessor than honor which comes after death, and which comes as David says in the "Rivals," "Exactly when we can make shift to do without it."

The fees of the lawyers of antiquity were not, it seems, large, unless we go away back to the lucky Isocrates who was said to have received one fee of twenty talents, about $18,000 of our money, for a speech that he wrote for Nicocles, King of Cyprus; but kingly clients, and *such* kingly clients, have been *exceedingly* rare in the world's history. In the year 1500, 3s. 4d. was thought to be a sufficient fee to a sergeant for advice to the corporation of Canterbury regarding their civic interests, and only a little later the wealthy Goldsmiths' Company liberally rewarded a sergeant, "learned in the law," by a fee of 10s., and that for services in an important matter. From the "Household and Privy Purse Expenses of the Le Stranges of Hunstanton," it appears that noble house paid to Mr. Knightly 8s. 11d. "for his fee, and that money yt he layde oute for suying of Simon Holden," and the same lawyer also received at another time 14s. 3d. "for his fee and costs of sute for iii. termes."

It is recorded of Sir Thomas More that he "gained, without grief, not so little as £400 by the year," and this income, partly made up from the emoluments of his judicial appointments, was said to be a very considerable one, and equalled by but few of the bar. In Elizabeth's reign a fee of ten shillings was the ordinary reward, and the fact that the ten shilling

piece was called an "angel," led to that witty saying, then common, that "a barrister is like Balaam's ass, only speaking when he sees the angel." Elizabeth's solicitor-general received but £50, and the king's counsel to James I. only £40 a year, with an allowance for stationery. But these were only a kind of retaining fee, and similar fees were paid for business done. When Francis Bacon was James' attorney-general, at an annual salary of only £81 6s. 8d., he managed to make £6,000 per year, a princely income, indeed, in those days.

Maynard, the great parliamentary lawyer of Charles I.'s time, received on one round of the western circuit £700, which Whitelock, a contemporary, believed "was more than any one of our profession got before."

In Charles II.'s time a thousand pounds a year was considered a good income for a successful practitioner, but the great advocates and leaders made anywhere from two to four times that amount, and Sir Francis North, attorney-general, received from private and official business nearly seven thousand pounds. He was avaricious and grasping, and made every penny count. In the "Life of Lord Keeper Guilford," Sir Francis' method of gathering his fees is thus described: "His business increased, even while he was solicitor, to be so much as to have overwhelmed one less dexterous; but when he was made attorney-general, though his gains by his office were great, they were much greater by his practice; for that flowed in upon him like an orage, enough to overset one that had not an extraordinary readiness in business. His skull caps which he wore when he had leisure to observe his constitution, as I touched before, were now destined to lie in a drawer to receive the money that came in by fees. One had the gold, another the crowns and half crowns, another the smaller money. When these vessels were full they were committed to his friend (the Hon. Roger North) who was constantly near him, to tell out the cash and put it into the bags according to the contents."

Sir John Cheshire, King's Sergeant, made about the year 1720, an average annual income of 3,246*l*, and Mr. Jeaffreson, in his charming "Book about Lawyers," gives the following statement of the growing fortunes of Charles Yorke: "1st years' practice at the bar, 12*l*; 2nd, 20*l*; 3rd and 4th, between 300*l* and 400*l* per annum; 5th, 700*l*; 6th, 800*l*; 7th, 1,000*l*; 9th, 1,600*l*; 10th, 2,500*l*." While solicitor-general his income for one year reached 5,000*l*, and his receipts during the last year of his attorney-generalship amounted to 7,322*l*, a goodly income surely even for an attorney-general. But Lord Eldon, who used to tell the story that during the first year after his call to the bar, he only received a little over half a guinea, did even better than Yorke, for it appears from his fee-book that during his tenure of the attorney-general's office his receipts some time exceed 12,000*l* a year. Lord Kenyon's income before his elevation to the bench was estimated at about 8,000*l*, and yet he was so penurious that it was said to be impossible to tell whether his trowsers were cloth or leather, so greasy were they.

Erskine's rapid rise and brilliant career are well-known. Within eight months from his call to the bar he received the splendid fee of £1,000 from Admiral Keppel; and in latter years, when he had become the first advocate of England, his receipts were estimated as high as £12,000 a year, but this is probably a little too high. Edward Law's retainer for the defence of Warren Hastings brought with it £500, a sum not unworthy the princely fortune of the great Indian.

Of the receipts of the great lawyers of this country, there is hardly data enough to speak with exactness. Choate's income, or rather the value of his professional business, has been put at $18,000, but he was so indifferent about pecuniary matters that he probably did not receive, in hard cash, much above half that sum. Webster's income while at the bar is said to have been about the same; not large incomes surely for two such eminent lawyers in a great commercial city like Boston. But matters have mended even in Boston, and there are lawyers there to-day whose incomes from their profession are double those of Webster and Choate.

In New York there are two or three of the "leaders" of the bar who pocket annually, or at least have during the eight or ten palmy years just past, anywhere from fifty to one hundred thousand

dollars. But these are exceptional cases, and there are probably not fifty lawyers in New York, whose income, from their regular business, reaches ten thousand per annum.

The rank and file of the profession in this country do not make on the average three thousand a year, and a young man that has worked himself into a business worth two thousand a year is thought to have a very flourishing practice. There are of course many who have done better, while on the other hand there are many who have done worse.

It is a popular impression that the *speaking* lawyers, those who appear in court and have their names connected, in the newspapers, with the trial of cases, are the ones who reap the golden harvest, but this is by no means always the case. "Office business," as it is here called, is quite as profitable as "court business," and he who confines himself to the routine of office practice is apt to have in the end quite as much *eclat*, as he who devotes his energies to the more brilliant duties of the court room.—*Albany Law Journal.*

THE LAW OF CLUBS.

A Club is not a partnership, and the rights and liabilities of its members *inter se*, and towards the public, are not regulated by the law of partnership. In the matter of St. James' Club, 2 D. G. M. & G. 383, Lord St. Leonard said: "The law, which was at one time uncertain, is now settled that no member of a club is liable to a creditor, except as far as he has assented to the contract in respect of which such liability has arisen." And again he says: "The individuals who form a club do not constitute a partnership nor incur any liability as such." This case decided also that clubs are not "associations" within the meaning of the winding-up acts of 1848-9. The latter acts relative to "winding-up" do not change the law as to clubs as laid down in this case. The case of *Flemyng* v. *Hector*, 2 M. & W., 172, decided in 1836, is the leading case in England in respect to the liability of individual members of clubs for supplies furnished to the club. The "Westminster Reform Club" was organized under the following rules: That the initiation fee should be ten guineas; that the annual subscription should be five guineas; that if any subscription was not paid within a limited time, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club; and that all the members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them. The court held, in an action by an outsider against a member to recover for supplies furnished, that the individual members were not personally liable; for that the committee had no authority to pledge the personal credit of the members. Baron Parke, in his opinion, used the following language: "The rules of the club from its constitution. . . . This action is brought against the defendant on a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind. . . . It is upon the construction of these rules that the liability of the defendant depends." In order to render a member of a club liable, it must be made to appear that the rules of the club specially authorized the incurring of the personal liability, or that the member distinctly assented to it. *Todd* v. *Emly*, 8 M. & W., 505, was an action against a member to recover for the price of wine furnished to the committee of a club. Baron Alderson said that, "in order to establish the liability of the defendant, the jury should have been satisfied that what was done was not only within the knowledge of the committee generally, but also within the particular knowledge of the defendant." See, also, *Reynell* v. *Lewis*, 15 M. & W. 517; *Wood* v. *Finch*, 2 F. & F., 447. There are a few cases in which personal liability was held to exist upon grounds not at all infringing upon the doctrine of the above cases. In *Cross* v. *Williams*, 7 H. & N., 675, an officer of a volunteer rifle corps was held responsible for uniforms furnished to the corps by a tailor, upon the principle that the officer had pledged his personal credit. In *Cockerell* v. *Aucompte*, 26, L. J. C. P., 194; 2 C. B. N. S., 440, the members of a club were held liable for coal purchased by the secretary, on the ground that the constitution of the club authorized the pledging of their personal credit.

Waller v. *Thomas*, 42 How., 337, was an action for rent against the members of the "City Club," a body consisting of over seven members, and therefore coming within the company laws of the State, in which the principal question was, whether under the New York statutes of 1849, 1851, and 1853, the members could be prosecuted in their individual capacity before exhausting the remedy against them in their collective capacity. The court held that mode of action was optional, in the first instance. This case is not inconsistent with the general English law on the subject of club liability.

The relations of committees to the remaining members of the club have not been judicially established, but where committee-men incur positive liability, their remedy over against the other members would depend upon the nature of the agency.

With regard to the funds of the club, it may be remarked that a court of equity will interfere to prevent waste or improvidence: *Charitable Corporation* v. *Sutton*, 2 Atk., 400; The court will not usually interfere to reinstate an expelled member. In *Hopkinson* v. *Marquis of Exeter*, 37 L. J. Ch., 173; L. R., 5 Eq., 63, by the rules of the club of which plaintiff was a member, it was made the duty of a general committee to arraign any member whose conduct or character was injurious to the interests of the society. Plaintiff was expelled in the prescribed manner, but the court would not interfere, no caprice or wrong motive being proved. In *Gardner* v. *Freemantle*, 19 W. R., 256, the power of expulsion was placed in the discretion of the committee, and the court would not interfere.—*Law Magazine.*

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COMMON LAW CHAMBERS.

(Reported by Mr. C. C. Robinson, *Student-at-Law.)*

Mitchell v. Roberts.

Law Reform Act—Postponing trial.

[June 5th, 1873, *Mr. Dalton.*]

Held, that on the return of a summons to try the cause in a County Court, on the ground that no difficult questions of law will arise, it is no answer to the application to put in affidavits, which are properly grounds for postponing the trial.

McDermott v. Elliott.

Law Reform Act—Expediting clause—Amendment.

[June 9th, 1873, *Morrison, J.*]

Held, in a case proper to be brought down to the County Court by the Law Reform Act of 1868, but the entry under form "A" was omitted from the issue book, but notice of trial having been given for the County Court, that the omission is not properly a ground for setting aside the issue book and notice of trial, but that the plaintiff will be allowed to amend on payment of costs.

Plews v. Mutton.

Interrogatories—Discovery of documents, &c.—C. L. P. Act, secs. 189, 190.

[June 16th, 1873, *Mr. Dalton.*]

Held, that on an application for leave to administer interrogatories when a party desires to ascertain what documents his opponent has in his possession relating to the suit, he must proceed under sec. 189 of C. L. P. Act, and cannot administer an interrogatory to that effect under sec. 190.

ASSESSMENT CASES.

In the Matter of the Appeals from the Court of Revision of the City of Kingston.*

Assessment of Bank Stock.

Bank stock is personal property, liable to assessment.

Bank stock held by a person as trustee, is not assessable as against the trustee.

It is immaterial as to the locality where bank stock may be said to exist, as, unlike real property, it must, like other personal property, be assessed at the place of business or residence of the owner.

[Kingston, July 9, 1873—*Burrowes, Co. J.*]

The following persons who had been assessed in respect of certain stock held in several char-

* Since the above judgment was printed, we have received notes of decisions on the same point by Judges Boswell and Dennistoun, who have arrived at a different opinion from that expressed by Judge Burrowes. We shall publish their judgments next month.—Eds. L. J.

tered Banks appealed from the decision of the Court of Revision in the City of Kingston to His Honor Judge Burrowes.

John Watkins, in respect of shares of the stock of the Bank of Commerce, the Bank of Montreal, and the Merchants' Bank, alleged to be illegally assessed and assessed to a greater amount than their proper value.

George C. Hale, in respect of shares of the stock of the Bank of Montreal held by him in his own right, and in respect of shares of the stock of the Banks of Montreal and British North America held by him as trustee for Mr. Orlibar; and in respect of shares of the Bank of British North America, the Merchants' Bank, and the Bank of Commerce, held by him in his own name, but of which other persons were beneficial owners; all which shares were alleged to be unlawfully assessed, and to be assessed to a greater amount than their proper value.

The Queen's College, in respect of shares of he stock of the Merchants' Bank unlawfully assessed.

The parties appeared by Counsel as follows:—

Jas. A. Henderson, Q. C., George A. Kirkpatrick, G. M. Macdonell, and *Jos. Bawden* appeared for the different appellants, and *James Agnew* for the Corporation of the City of Kingston.

BURROWES, Co. J.—After giving this matter the best consideration in my power I have arrived at the following conclusions.—

1. For the purpose of assessment in Ontario all property is divided into real property and personal property. Real property consists of land, including buildings, things forming in law part of the realty, and minerals, except what belongs to the Queen. Personal property consists of all property except real property, and property exempted by the statute: 32 Vict., Ontario, cap. 36, sec. 41.

2. Bank stock is personal property exempted from assessment so long as there is a special tax on bank issues, but no longer: 32 Vict., cap. 36, sec. 9, sub-sec, 16, O.

3. There is no longer a special tax on bank issues: Dominion Statutes, 34 Vict, c. 5, sec. 15; therefore bank stock is personal property liable to assessment.

4. It is clear that the Legislature of Ontario considered that bank stock would be liable to assessment under 32 Vict., c. 36, sec. 4, unless it were expressly exempted from assessment, which they did by sec. 9, sub-sec. 16, of same statute; it was therefore exempt until the exemption was repealed by subsequent legislation. It is therefore not now exempt, but now forms a part of the personal property defined by sec. 4 not exempted from assessment, and it is liable to assessment as a part of the rateable property mentioned in section 8, same Ontario statute.

5. In assessing bank stock it is to be estimated at its actual cash value: 32 Vict., cap. 36, sec. 30, O.

6. There is a remarkable difference in the manner prescribed for the assessment of real and personal property. Real property is to be assessed in the municipality in which it lies. Personal property owned by a person having a farm, shop, factory, office, or other place of business, where he carries on a trade, profession or calling, shall, *wherever situate*, be assessed in the municipality or ward where he has such place of business at the time when the assessment is made; 32 Vict., cap. 36, sec. 39, and if he has two or more such places of business in different municipalities or wards, he shall be assessed at each for that part of his personal property connected with the business carried on thereat, or for part at one place of business and for part at another: sec. 40; and if he has no place of business he shall be assessed at his place of residence: sec. 41.

7. I consider the effect of these provisions to be that real property must be assessed in the municipality where it lies, and that personal property, *wheresoever it is situated*, must be assessed in the municipality where the owner carries on his business, or if he has no place of business, where he resides.

8. The question of the place where bank stock exists, whether at the chief place of business of the bank, or at the place of business or residence of the owner, is of no importance, inasmuch as it is personal property and therefore, no matter where situate, liable to assessment at the place of business or residence of the owner.

9. The exemption of property which is owned out of this province does not affect any of the bank stocks of which the assessment is complained against, except that of Mr. Orlibar; for all the other owners reside in Ontario.

10. Assessments of property held in the name of one man as trustee for, or for the benefit of another, should be made distinctly from assessments made against a man in his own right: sec. 44.

11. Personal property of the University of Queen's College is exempt from assessment as being the property of a public literary and scientific institution: same statute, sec. 9, sub-sec. 10.

12. I consider therefore that the decisions of the Court of Revision should be confirmed, except in the case of Queen's College, and of Mr. George Hale in regard to his assessment for the stock of Mr. Orlibar.

13. The decision of the Court of Revision in the case of Queen's College is reversed; and it is ordered that the assessment roll shall be amended by omitting the assessment of Queen's College, and by striking out the assessment of Mr. Hale *quoad* the stock of Mr. Orlibar, which had been transferred from Hale to Orlibar before the assessment, and by entering the assessment of Mr. Hale in such a manner as to distinguish his private stock from that which he holds in respect of other persons, and the stock of every such other person from that of all the rest.

14. Although this decision is apparently final, yet it is not really so, inasmuch as the validity of the assessment may be readily questioned by means of an action at law in any court of competent jurisdiction.

In re Pain v. Town of Brantford.

32 *Vict., cap.* 36, *sec.* 63—*Assessment—Appeal.*

Held, 1. That the Clerk of the Division Court is not bound, under sec. 63, sub-sec. 3 of the Assessment Act, to receive an appeal unless the sum of $2.00 be deposited with him as security for the costs of the appeal.

2. That if so disposed he may give credit for the amount, and, if he does so, the appeal is properly entered and ought to be heard by the County Judge.

3. That a complainant to the Court of Revision is bound to appear and support his appeal. But if he fail to do so, it is in the power of the Court to hear the complaint *ex parte*, and if after such an *ex parte* hearing the Court affirm the assessment, the complainant may appeal from the decision to the County Judge.

[Brantford, July 9, 1873—*Jones, Co. J.*]

This was an appeal to the Judge of the County Court of the County of Brant, under and pursuant to sec. 63 of the Assessment Act, against the decision of the Court of Revision of the Town of Brantford, in respect of the assessment of Thomas H. Pain. The complaint made was that he was wrongfully on the roll. The complainant did not appear before the Court to support his complaint, but the Court of Revision having called the complainant and he not appearing, made an order confirming the assessment. From this order the complainant appealed. He gave the notice of his intention to appeal under sub-sec. 1 of sec. 63 of the Assessment Act, within the time limited in that behalf by that section. But he did not deposit the sum of $2.00 within the same time as required by sub-sec. 3 of that section. His attorney gave several notices of intention to appeal from the decision of the Court of Revision and arranged with the Clerk of the Division Court to give him a cheque for the aggregate amount, so soon as the number was ascertained. The cheque, however, was not given until long after three days, and shortly before the day fixed for the County Judge for the hearing of the appeal.

Harrison, Q. C., objected that the appeal ought not to be heard, because the sum of $2.00 was not deposited in the manner and within the time limited by the statute, and because the appellant not having appeared to support the complaint in the Court of Revision, the Court rightly affirmed the assessment, and he could not be looked upon as a party dissatisfied or aggrieved within the meaning of the Act. As to the first point, he argued that the right of appeal is only given on certain conditions, one of which is that the party shall within three days give written notice of appeal, and the other that he shall at "the same time and in like manner" deposit the sum of $2.00 for each decision appealed against "as security for the costs of the appeal." That the one is quite as imperative as the other, and that a failure in either disentitled the party from a right to appeal: *The Queen* v. *Cornwall*, 25 U. C. Q. B., 286. That the words being plain and the appeal given only to a class, the only question is, whether the appellant, according to the interpretation of the section, was one of that class, and that the language being plain it ought not to be discarded for "equivalents:" *McDowell* v. *Berry*, Ir. Law Rep. 399; *Cohen* v. *O'Donovan*, 3 Ir. Law Rep. 726; *Harding* v. *Knowlson*, 17 U. C. Q. B., 564; *Jackson* v. *Kassell*, 26 U. C. Q. B., 341. He also referred to Statutes 16 Vict. cap. 182, s. 28, Con. Stat. U. C. cap. 55, s. 63, to show that the $2 is not necessarily to be looked upon as security for the costs of the Court to the Clerk. As to the second point, he argued that a party complaining to a Court of Revision should appear and make good his complaint, or else be concluded by the ruling of the Court. He pointed out that any other construction of the section would enable a complainant to hold back his complaint, and for the first time spring the grounds of it upon his opponent in the Court of Appeal, and so in effect make the latter the Court of Original Appeal instead of a Court of Review as to the grounds of the decision in the Courts below. He cited *Rex* v. *JJ. Suffolk*, 1 B. & Al. 640; *Rex* v. *JJ.*

Kent, 9 B. & C. 283; *Rex* v. *Tucker*, 3 B. & C. 544; *The Queen* v. *The Inhabitants of Stoke Bales*, 6 Q. B. 158, 162.

A. S. Hardy, contra. The $2 is security only to the Clerk of the Court for his costs of the appeal; and he may waive the requirements of the statute made for his own protection, and give credit if so disposed, and that if he do so the party has sufficiently complied with the requirements of the Act giving the appeal, see Con. Stat. U. C. cap. 19, ss. 49, 50, 67 and 68. The Court of Revision having made an order, affirmed the assessment. This was a decision on the part of the Court, and from that decision the party dissatisfied had a right to appeal: *In re Judge of Perth and Robinson*, 12 U. C. C. P. 252; and at all events the right of appeal was not to be taken away in a doubtful case: *In re Justices of York and Peel and Mason*, 13 U. C. C. P., 159.

Harrison, Q.C., in reply. It is quite immaterial for whom the $2 is payable. The appeal is given only to a class, viz.—those who within three days give written notice of appeal *and* deposit $2. That appellant is shown not to be one of that class, and therefore ought not to be allowed to appeal. The question is simply one of the construction of the statute, and the construction is not open to any reasonable doubt.

Jones, Co. J.—In this matter two objections have been raised by Mr. Harrison, who appears for the respondent, against my jurisdiction to hear this appeal. Firstly, that the appellant did not within three days after the decision of his appeal by the Court of Revision deposit with the Clerk of this Court the sum of two dollars as security for the costs of this appeal; and Secondly, that the appellant did not appear before the Court of Revision and offer any evidence, either of himself or any other witness in support of his appeal, and that therefore, there was no hearing of the appeal, and no decision by the Court of Revision from which the appellant can appeal to me.

These objections apply to several of these appeals. I will consider them in the order in which I have stated them.

Under sub-sec. 3 of sec. 63 of the Assessment Act, if the $2.00 is not paid at the time the appellant gives the notice of appeal to the Clerk of the Division Court, or within the three days limited for lodging the appeal, I think the Clerk need not receive the appeal, and the case could not come before me for hearing.

In the present matter the Clerk received the appeal without the actual payment of the $2.00, waiving the present payment thereof, and taking the credit of the attorney of the appellant as payment or security for the payment of the money. Had he the right to do this, or having done it, is the appeal properly lodged, so that I have jurisdiction to try it? Is the $2.00 a security for the costs of the respondent, or as argued by Mr. Hardy, a security to the Clerk for his costs?

The 68th section of the Assessment Act provides that the costs of these appeals shall be taxed according to the Schedule of Fees under the Division Courts Act, as in suits for the recovery of sums exceeding the sum of $40.00 and not exceeding $60.00. The fees here referred to cannot be either the respondent's or appellant's costs, but the costs going to the Clerk, Bailiff, and fee fund. There is no tariff of fees taxable to plaintiff or defendant in Division Court proceedings. The $2.00 required to be deposited with the Clerk is stated to be paid as security for the costs of the appeal. This can only mean as security to the Clerk for the fees of himself, the Bailiff, and fee fund, for the costs of the proceedings required to be taken by them on the appeal. The $2.00 would not cover, in fact, the whole costs payable to the Clerk and the fee fund on the proceedings in this appeal, so that none of it could be a security to the respondent, or could in any event be awarded to him. This security, therefore, is not analogous to that given by recognizance in appeals from summary convictions; the recognizance there being enforcable for the costs of the respondent, if the Court so order.

An argument has been based by Mr. Harrison upon the old Assessment Act of 1853, (16 Vict. c. 182, sec. 28.) from which our present Act was consolidated, to show that this proceeding before me is not in the Division Court, nor of the character of a Division Court suit, and that the Clerk of the Division Court here is not entitled to any part of this $2.00 for his fees. I have examined this Act carefully, and do not think that these conclusions can be drawn from it. It is true that this is not a Division Court suit, but the proceedings are, I think, of the same character. The appeal is lodged with the Division Court Clerk. It is to be heard or tried by the County Court Judge, who presides in the Division Courts. The costs of the proceedings are to be taxed according to a certain schedule or tariff of fees payable to the Clerks and fee fund in that court, and the payment of the $2.00 is according to the practice adopted in these courts, of the Clerk requiring in ad-

vance a deposit to meet his fees, and those going to the fee fund, for the proceedings to be taken in each suit. See the note in O'Brien's Division Courts Act, on secs. 49 and 50 of that Act.

It was argued that the words "costs of appeal," and the words "costs of the court," in the above section referred, the former to the appellant's or respondent's costs, and the latter to the costs of the Clerk and fee fund, but I think they both clearly mean the same thing, viz., costs taxable to the Clerk and fee fund under the schedule mentioned in that section, for there are, as remarked, no costs taxable in Division Courts to either plaintiff or defendant, under the schedule referred to, nor on any proceedings in the court, and the section provides that each party shall bear his own witness fees, so that the respondent would not be entitled to any costs. The 28th section of the Act of 1853, provided that the costs of the court should in all cases be borne by the appellants, and this is the reason, I think, why he was required to deposit the $2.00. The deposit there being a security to the Clerk he may insist upon its being paid in advance in the same manner as the 49th and 50th sections of the Division Court Act require the fees of all proceedings to be paid to him in the first instance. But if he choose to waive it, or as in this case to take the security of the appellant's attorney, I think he may do so, and the legality of the proceeding is not affected thereby. The Clerk here takes the guarantee of a third party as payment of the $2.00 going to him. As far as all other parties are concerned, it is, I think, a payment, and the statute is satisfied.

I have not found the second objection so difficult to dispose of (see sec. 60, sub-secs. 13 and 14, and sec. 61 and 63 of Assessment Act). I do not entertain any doubt but that the final passing of the Roll by the Court of Revision, as provided by the 61st sec. of the Act, is a *decision* by that court of every appeal properly lodged before it, and that an appeal lies from such decision to the County Judge by any party dissatisfied with that decision, as provided by the 63rd section of the Act (see *In re County Judge of Perth and J. L. Robinson*, 12 U. C. C. P. 252.) Where a party lodges an appeal he ought in good faith to appear at the proper time and support his appeal, and if he does not do so the court may decide his case *ex parte* against him, but the statute would still give him the right of appeal if dissatisfied with that decision, and I do not think that right is lost from the fact that he did not appear in the court below and maintain his case there. Sec. 60, sub-sec. 13, implies, I think, that it is optional for the appellants to produce witnesses before the Court of Revision or not, and sub-sec. 14 provides that if they fail to do so the court may proceed *ex parte*.

I am glad that I have been able to come to this conclusion, as I should have regretted had the rights of the parties before me been disposed of upon a preliminary objection, without an enquiry into the merits, although it would have relieved me of a great deal of labor which I am not just now very able to perform. I have endeavored to give due weight to the forcible arguments of Mr. Harrison, on behalf of the respondents, but have not been able to agree in the conclusions he has come to, and I have felt it right when I have been in doubt to lean to such a construction of the statutes as would not shut the parties out from having their cases investigated before me. And on the authority of the case cited by Mr. Hardy, *In re Justices of Peel*, 13 U. C. C. P. 159, I have thought that in a doubtful case a party should not be deprived of his right of appeal.

ENGLISH REPORTS.

CHANCERY.

Booth v. Alcock.

Light and air—Lessor and lessee—Grant of lights—Injunction.

The court will restrain a landlord from interfering with his tenant's lights, although the diminution of light is not great, and although if the contest were merely between neighboring properties, the court would only award damages.

The defendant being lessee of properties A. and B., granted an underlease of A., "together with all lights," to the plaintiff. He subsequently acquired the fee in B.

The court restrained him from so building upon B. as to interfere in any way with the lights of his lessee of A.

[March 20, 1873.—28 L.T.N.S. 221.]

By indenture dated 31st Aug. 1864, the defendant underleased to the plaintiff for the term of twenty-one years a messuage, No. 26, Old Change, in the city of London, "together with all edifices, buildings, ways, lights, sewers, water-courses, rights, easements, advantages, and appurtenances." The lease contained a covenant for quiet enjoyment. At the time of granting the underlease the defendant was himself lessee of the messuage, for the term of eighty years, and was also assignee of an underlease of an adjoining messuage and premises in

Distaff-lane, situate on the east side of the Old Change property, of which the term would expire in 1868.

The messuage, No. 26, Old Change, was lighted on the east side by windows and a skylight. Subsequently to granting the underlease of the Old Change property, the defendant purchased the freehold of the property in Distaff-lane, and pulled down the messuage with the intention of rebuilding it. The defendant proposed to raise the new building 21ft. higher than the old one, which would have the effect of interfering to some extent with the plaintiff's light.

On the 19th Feb., 1873, the plaintiff filed a bill to restrain the defendant from raising the house in Distaff lane to a greater height than the house which formerly stood there, or so as to interfere with the plaintiff's light and air. The case now came on on motion for injunction.

Cotton, Q.C., and *E. Harvey* for the plaintiff.

Glasse, Q.C., and *W. R. Ellis* for the defendant.

The following cases were cited:—*Tipping* v. *Eckersley*, 2 K. & J. 264; *Beadel* v. *Perry*, L. Rep. 3 Eq. 465; 15 L. T. Rep. N. S. 345; *Senior* v. *Pawson*, L. Rep. 3 Eq. 330.

The Vice-Chancellor said he did not think the diminution of the plaintiff's light would be great, still there would be a material interference with it. If this had been an ancient light case between neighbouring proprietors, he thought it would have been a case for damages and not injunction; but it was clear that a landlord could not do anything in derogation of his tenant's rights. The plaintiff was entitled to the uninterrupted use of his lights for every purpose for which they could possibly be used. The injunction must, therefore, be granted.

COURT OF QUEEN'S BENCH.

Reg. v. Castro.

Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defence—Vituperation of judge and attacks upon witnesses—Privilege of members of Parliament—Fine and imprisonment.

The defendant had been committed for perjury by the judge who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendants' case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be nonsuited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into this court; and it had been fixed, upon application of the Attorney-General, that the trial should take place at Bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister-at-law, had held public meetings for the purpose of obtaining money for the defence at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defence at the trial of the ejectment, and prejudice and partiality to the Lord Chief Justice of this court, who, they said, had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment.

Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the Lord Chief Justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them.

The members of Parliament who made these remarks, when summoned to answer for contempt, apologised, and submitted themselves to the court. They were, therefore, only fined 100*l.* each; but it was held that the court would not allow the privilege of the House of Commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it.

The barrister-at-law, whose offence was more aggravated than that of the others concerned, was sentenced to three months' imprisonment, and a fine of 500*l.*

The court, not desiring to prejudice the defendant in his defence at the forthcoming trial, merely bound him and one surety over in recognisances of 500*l.* each, to be forfeited if the defendant attended any more public meetings of the kind complained of.

[Jan. 20, 29, 1873.—28 L.T. N.S. 222.]

Upon the application of the prosecution, Mr. Guildford Onslow, M.P. for the borough of Guildford, and Mr. Whalley, M.P. for the city of Peterborough, had been summoned to answer a charge of contempt of court by endeavoring to prejudice the course of justice upon the trial of indictments which have been removed from the Central Criminal Court, but have not yet come to be tried. The defendant had been claimant in an ejectment, *Tichborne* v. *Lushington*, in the Court of Common Pleas, the only issue in which was the identity of the claimant with the person he alleged himself to be, viz., Sir Roger Charles Doughty Tichborne, Bart. The circumstances of the action are to be found reported in the case of *Tichborne* v. *Mostyn* (L. Rep. 8 C.P. 29; 26 L. T. Rep. 554.) The trial lasted 103 days, and during the case for the

defence the jury expressed their opinion in opposition to the claimant's alleged identity, and the claimant elected to be nonsuited. Bovill, C. J., who tried the case, then committed the claimant for perjury, and upon his Lordship's suggestion the prosecution was undertaken by the Treasury. Subsequently true bills for perjury and forgery were found against him by the grand jury at the Central Criminal Court; and those true bills, which are the indictments in this case, were removed upon *certiorari* by the prosecution into this court. The trial of the defendant for perjury has, upon the application of the Attorney-General, been fixed to be held at Bar, and to be commenced during next Easter term. Defendant, who is on bail, has, with his friends, been addressing public meetings in various parts of the country, convened by them for the purpose of obtaining funds in aid of the defence at the forthcoming trial.

Two of these public meetings were held at St. James' Hall, in the county of Middlesex, on the 11th and 12th Dec. last. Mr. Onslow, Mr. Whalley, and the defendant were present on both occasions. On the 11th Dec. Mr. Whalley, who was in the chair, addressed the meeting, and introduced Mr. Onslow, who then addressed the meeting and spoke in these terms:

It may be as well that I should explain to you that our object in addressing the British public had its origin on these grounds. We were refused in the House of Commons replies to questions we put to the Ministers. Our mouths were shut in that House, and knowing, as we do, that we are supporting the right man in a good and honest complaint, we have nothing left but to appeal to public opinion. We don't ask you to say whether he is or is not Sir Roger Tichborne; but we ask you to say and believe that he is an Englishman, and, as an Englishman, that he is justly entitled to fair play, which is the birthright of everyone of our countrymen. (Cheers.) Now, I maintain that in the late trial he did not receive the fair play he is entitled to. The long-winded speech of the Attorney-General, lasting 21 days (hisses), was never replied to, and we have a perfect right to assume that had Sergeant Ballantine been permitted to reply he would have turned the minds of the jury and of the public as much as they were turned by the Attorney-General. (Cheers.)

Mr. Onslow concluded a long speech by saying that in the great undertaking in which they were engaged they had obtained information, and would bring forward witnesses on the trial, that would, if the claimant were treated with the justice he had a right to demand, lead to his honourable and triumphant acquittal.

At the second meeting held on the next day, at which a Mr. Skipworth was in the chair, Mr. Whalley spoke thus:

There are then, gentlemen, in this case two questions. In the first place is this man truly Sir Roger Tichborne? (Loud cries of "Yes, yes.") In the second place is that fact known? Now, mark and observe this, because these are words which I speak with a due sense of responsibility to those whom I meet in social life, to the House of Commons, where I have and shall again pledge all that I have worked and laboured for during twenty years on the strength of my convictions—is that fact, if fact it be, known to the Attorney-General? has it been known to him throughout this prosecution? is it known to Her Majesty's Government, or to Mr. Gladstone, or, which is the same thing, have they given 100,000*l.*, or whatever other money they have given, out of your pockets, have they given that money to prosecute this man and to convict him of offences without taking the ordinary and proper means at their command for ascertaining the fact whether he be really guilty of perjury or not?

And again:

I have charged the Tichborne family, I have charged directly and in print the Doughtys, the Radcliffes, and the whole lot of them together, with knowing that he is the man, and combining in a conspiracy against him. (Loud cheers.) Now, ladies and gentlemen, you will naturally say how can we listen to such a Don Quixote as that? What a fool that man must be to throw himself into a quarrel that in no manner concerns him, merely as to the question whether this gentleman or somebody else is entitled to certain estates in Hampshire, and here it is, ladies and gentlemen, that I come to the real question which concerns you and me, and the hundreds of thousands of men that I have addressed throughout the country. Here we come now to the public question. Gentlemen, the time has not come when either I should be justified in speaking or you would be prepared to listen to those possibilities of conspiracy in a matter of this kind, which I do believe, it is my hope, my expectation, the very object for which I exert myself in this case, will in due time become more fully developed and understood by the people of this country. What is the nature of this conspiracy? What is the origin? What are the grounds on which, six years ago, these people met in a drawing-room in London, and said we will defy the laws of

England, we have these estates, here is the man, it is not expedient that this man should have these estates, we will keep them, we are strong enough in Parliament, strong enough on the Judicial Bench, strong enough in society to defy the laws of England. (Cheers.) Gentlemen, I am not prepared to enter into that to the extent I feel it. I say that I live in the hope that the time will come when it will be quite legitimate to address you on the nature of that conspiracy against Sir Roger Tichborne which I state here to-night, in accordance with a challenge which I gave three months ago at the last public meeting in London, in Oxford Hall, to this effect—That I should be prepared to meet the Attorney-General or any of the six counsel most eminent at the Bar, or any other advocates that he might put forward, and to satisfy any intelligent London audience that it was not consistent with the facts of this case, as I should present them to you, that he did not know throughout that trial that he was prosecuting that the claimant was Sir Roger Tichborne, and that he and the Government afterwards at his advice do now at this moment know, or that they have the means of knowing, that it is so; that in sustentation of their conspiracy for the purpose of retaining these large estates in the hands of the Arundel family, the leading family, as we know, in a certain influential circle of society—for the purpose of retaining these estates in that family, and sustaining the whole course of their conduct from first to last, that they do know, or, as I say, have the means readily of knowing, that they are attempting to prosecute to conviction, to penal servitude, or again to Newgate, a man whom they know to be innocent of the charge brought against him.

Mr. Onslow afterwards made a long speech at the same meeting, of which the drift was to urge the audience to make subscriptions for the defence, and in the result Mr. Whalley moved a resolution:

That this meeting declares its opinion, in common with the country at large, that the prosecution of the claimant at the public cost was uncalled for, and, in the absence of explanation, which had been refused, wholly unjustifiable, and demands public reprobation; and that the support and sympathy of the British public are justly due to the claimant. This resolution was carried.

Upon the reports of these speeches, verified by affidavit, *Hawkins*, Q.C. (with him *Bowen*) had on behalf of the Crown moved for and obtained the summonses herein. Both gentlemen now appeared in court accordingly.

Sir *J. B. Karslake*, Q.C. (with him *A. L. Smith*) on behalf of Mr. Onslow, read an affidavit filed by him, in which he stated, among other things, that for many years of his life he lived on terms of intimacy and friendship with the late Sir James Tichborne and Lady Tichborne, his wife, and upon the death of the latter he attended her funeral at Tichborne Park. Sir James Tichborne and he were natives of the same county, and they saw a good deal of each other at different times. After the arrival of the claimant in this country in 1866 he became acquainted with him, and was in communication with Lady Tichborne on the subject of his identity, and he knew from her that she identified him as her firstborn son, the issue of her marriage with Sir James Tichborne, and as far as he could judge, he believed she had no doubt whatever on the subject. He was earnestly entreated by her ladyship before her death not to abandon or desert her son, the said claimant, and he faithfully promised that he would never do so, and, honestly believing, as he had always done and still did, that the person identified by her is her son, he had endeavoured to the best of his ability and power during all the proceedings in the Court of Chancery and in the Common Pleas, to assist him in establishing his claim to the title and estates. It is a matter of notoriety, he said, that, ever since the claim was first made by the claimant to the present moment, his identity has been made the topic of conversation and discussion among all classes in the House of Commons, in the clubs, in society, and in almost every part of the kingdom: and finding that the result of the trial had had the not unnatural effect of creating a very strong prejudice against the claimant (the greater because many statements which had been made, but not proved by witnesses, were assumed to be true), he did attempt to counteract the feeling of prejudice, with the view and object, so far as he could attain them, of preventing the result of the trial from operating unjustly against the claimant in the criminal proceedings taken against him. After the release of the claimant from prison (Lady Tichborne, from whom during her life he received 1000*l.* a year since his return, having died) the claimant was wholly without funds to meet the expenses of his defence. He attended meetings in parts of the country with the object of obtaining funds for the purpose of defraying the expenses of his trial. The meetings of the 11th Dec. and the 12th Dec. 1872, mentioned in the affidavits filed upon obtaining the rule in this case, were meetings called for such purposes as

aforesaid. In the observations which he made, his desire, intention, and object were to counteract the feeling of prejudice existing against the claimant, so that he might, if possible, go into court to meet his trial for the criminal offence alleged against him unprejudiced by the result of the trial at *Nisi Prius*, and the comments which had been made upon him in the course thereof. He said that although now it was obvious to him that such observations, made with the sole object and purpose aforesaid, might be considered to have the effect of reflecting upon the character of witnesses and the conduct of the prosecution, it did not occur to him that such was or might be the effect. He had not the slightest intention of prejudicing or interfering with or preventing the course of justice, and it was with great regret that he had taken a course unwittingly which could be looked upon as indicative of having ever entertained any such intention. The affidavit thus concluded: "I repeat that at the time I made the observations complained of I had no intention whatever of interfering with the course of justice in the trials which are now pending. I made such observations under the circumstances and with the objects only above stated by me. As soon as I read the report in the public papers, of the motion to this honourable court, I saw that I had been betrayed into taking a course which laid me open to the imputation of having, in trying to remove prejudice operating against the claimant, created prejudice against the prosecution, and therefore, pending a trial, improperly commented upon matters connected with it; and I desire to express my unfeigned regret at having taken such a course, and to apologise in all sincerity to this honourable court for the conduct for which I am arraigned." So far as the counsel had been able to look into the subject, he found, he said, that where a matter was actually pending in a court it had always been deemed improper to comment upon the evidence which was or would be given on the hearing; and that if the effect of the comments were or might be to reflect upon the administration of justice, or to prejudice the fair trial of the case, then there was technically a contempt of court. In the present case the proceedings, no doubt, were so far pending that indictments had been found against the claimant which were standing for trial in this court; and so far as he could form an opinion from the authorities (though there was no express authority precisely in point), it might be considered that the proceedings were pending. If, however, he should be wrong in that view, and if in point of law the case was not pending, he hoped his admission would not prejudice the case of Mr. Onslow. The course he proposed to adopt, and which had been suggested to him by Mr. Onslow rather than suggested by himself to his client, was to explain the circumstances under which that gentleman came to use the words complained of, and this he had done in his affidavit. He desired to urge that from the course the trial of the action had taken, it had come to a close before the evidence had been fully gone into, and many things had been stated by the Attorney-General which, it was believed by his client, would not have been capable of proof, and Mr. Onslow had made his comments under the impression that the case, had it been concluded regularly, would have turned out very differently. No doubt, however, in the course of Mr. Onslow's speech allusions were made to the coming trial, and he felt bound to admit that there were observations made which technically amounted to a contempt, inasmuch as they might tend to prejudice the fair trial of the case. Therefore they would come within the rule he had adverted to, assuming that the court would be of the opinion that the case was pending. [Cockburn, C.J.—On that point we entertain no doubt.] That being so, of course the case would come within the principle of several recent decisions in the Court of Chancery on this very case, with reference to observations in the press. And he expressed on the part of Mr. Onslow his regret that he should have been betrayed into these observations. [Cockburn, C.J.—There is a question, Sir John, which I think it proper to put, and which is important. Are we to understand that Mr. Onslow, in expressing that regret, which has been so happily expressed by you on his behalf, intimates to the court his clear intention and resolution not again to take part in any such proceeding?] Most undoubtedly; and he made that statement at Mr. Onslow's direction.

Digby Seymour, Q. C. (with him *Morgan Lloyd* and *Macrae Moir*), on behalf of Mr. Whalley, read an affidavit, in which that gentleman entered at great length into the facts of the ejectment. The affidavit concluded as follows: "And I further say that I attended the said meetings with the sincere and honest conviction that the same were lawful public meetings, convened for a legitimate object, and that I had a full right to discuss the matters contained in the speeches delivered by me at such meetings. It never occurred to me that anything said by me at the said meetings would

unduly influence the jury that might be empanelled to try the said indictments, nor in any other way prevent a fair and impartial trial." The counsel observed that he was not aware of the course which was to be taken by Sir J. Karslake, who had acted without any communication or concert with him; and while he fully concurred with him in the language he had employed, he felt it his duty to point out to the court that there was this distinction between the present case and any other, that here the parties were commenting upon a former trial which was concluded. [COCKBURN, C. J.—But with attacks upon the conduct and character of witnesses who were to be called again as witnesses. LUSH, J.—He suggests that what they have done once they would be likely to do again.] Mr. Whalley states that his only object was to promote an appeal on behalf of the defence. [COCKBURN, C. J.—But if the obvious effect was to prejudice the fair trial of the prosecution, the purpose would not be material.] It might be material in a case of mere constructive contempt such as this. In all the other cases there had been attacks upon particular witnesses in a trial or hearing still pending. [COCKBURN, C. J.—So there are here, for particular persons who are expected to be called as witnesses are charged with perjury.] This was explained as having reference to the former trial. [COCKBURN, C. J.—The question of identity being the same in the civil as in the criminal trial, those witnesses who gave their evidence in the former trial against the claimant would be called again in the ensuing trial to give their evidence against him. If the meeting had been convened only for the purpose of providing funds for the approaching trial, perhaps that might not in itself have been reprehensible. But if, speaking with reference to the approaching trial, those witnesses who it is known will be called to give evidence are denounced as conspirators, and as intending to give perjured evidence—is it to be doubted that this is a contempt? Is not this the test? Suppose a person afterwards called as a juror on the coming trial had been present at the meeting and heard these persons charged as perjured conspirators, would it not have been calculated to prejudice his mind?] If Mr. Whalley used language tantamount to that, he could not of course vindicate it; but he denied that he had any idea of his language having such an effect. He was stating his reasons why persons should subscribe to the defence. That takes it out of the charge as to contempt. [BLACKBURN, J.—That is quite contrary to the law, as I have always understood it.] In all the previous cases on the subject there had been attacks upon witnesses for their evidence on the very proceedings then pending; for instance, in the Chancery cases there had been attacks upon persons who had made affidavits in the case being heard. Surely there is a broad distinction between those cases and the present! [MELLOR, J.—Even if there had been no direct allusion to the coming trial, can any man doubt that the statement that the witnesses in the former trial were in a conspiracy to deprive a man of his estates by means of perjury, would have had an effect upon the public mind as to the coming trial, in which, of necessity, the question would be the same and the witnesses must be the same?] Mr. Whalley had a lawful object in view, in the course of urging which he had fallen into the use of this language. His object was only to promote subscriptions for the defence. [BLACKBURN, J.—I have no doubt in all cases of newspaper contempts which have occurred, the object was not to do injustice, but to promote the sale of the paper; but has that ever been considered an excuse? LUSH, J.—Can any motive excuse the assertion at a public meeting that the witnesses on a coming trial are in a conspiracy to commit fraud by means of perjury?] He commented upon the evidence they gave at the former trial in order to show that they were combined together to defeat the claimant. [LUSH, J.—With a view to show that they were likely to give false evidence on the coming trial.] Not necessarily so. They might or might not be called at the next trial. These remarks might be the subject of criminal information. [BLACKBURN, J.—But even if so, it is no reason why a party should not be prosecuted for a contempt.] It might be a reason why the Court should not interfere summarily for a contempt that there was a remedy by way of criminal information. [MELLOR, J.—If Mr. Whalley had confined himself to pointing out the great odds against the claimant, arising from the wealth and social position of the family opposed to him, and had urged this as a reason for assisting him with subscriptions, avoiding all calumnious imputations upon those who were against him, his case would have been very different, and I should have felt very reluctant to visit him with any penalty. But he has not been content with this, and has imputed to the witnesses against him that they were in a conspiracy to defeat and convict an innocent man by means of perjury.] His object, however, was legitimate. [COCKBURN, C. J.—The motive or the object could not excuse

a contempt of court. Blackburn, J.—Unduly to interfere with a fair trial is not the less a contempt because it is done to get subscriptions for one side.] This is a "constructive contempt," and is, therefore, to be regarded with some jealousy. [Blackburn, J.—Where is the distinction between an actual contempt and a "constructive" contempt?] The distinction is very obvious: one is a direct attack upon the Court, and the other is only an indirect attack upon some of the parties or witnesses. [Blackburn, J.—Lord Cottenham said in *Mr. Lechmere Charlton's case* (2 Myl. & Cr. 316, 342), "It is immaterial what means are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order."] That was a very different case from the present. But even adopting that definition here, that was not Mr. Whalley's object. This was a constructive contempt, and a novel case, and would carry the doctrine of contempt further than any case which has yet occurred. Mr. Whalley disclaimed any intention to pervert the course of justice, or interfere with a fair trial; and if he had been guilty of a contempt, it had been unwittingly, and in the conscientious discharge of what he believed to be a public duty. He apologised to the Court, and promised not to attend any such meetings in future.

Hawkins, Q.C. (with him *Bowen*) appeared for the prosecution, and read extracts of the speeches made at the public meetings. He left the matter in the hands of the Court.

Cockburn, C. J. addressed Mr. Guildford Onslow and Mr. Whalley:—I have to express the unanimous opinion of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) that in the proceedings set forth in these affidavits to which you have been called upon to give an answer you have been guilty of a gross and aggravated contempt of the authority of the court. We are far from saying that when persons believe that a man who is under a prosecution on a criminal charge is innocent, they may not legitimately unite for the purpose of providing him with the means of making an effectual defence; and any expressions intended only as an appeal to others to unite in that object, though, perhaps, not strictly regular, would not be fit matter for complaint and punishment. We quite agree that it would be harsh and unnecessary to interfere with the expression of opinion honestly entertained, and expressed only for a legitimate purpose. But it is no excuse to urge when—at a meeting held for the purpose of providing funds—language is used which amounts to an offence against the law—and a contempt against the court—that the motive or the purpose for which the meeting was held was justifiable. And when we find that at a former trial the jury before whom the claimant gave his evidence declared that they disbelieved that evidence, and that the learned judge, who presided at the trial, directed his prosecution, and that a grand jury—the proper and constitutional tribunal—have found true bills against him on the serious charges of forgery and perjury—that such a man should be paraded through the country and exhibited as a sort of show at public assemblies as the victim of injustice and oppression, and that at these meetings—in violent and inflammatory language — witnesses who had given evidence against him on the former trial should be held up to public odium as having been guilty of conspiracy and perjury; that the counsel engaged against him, and even the judge who presided at the trial, should be reviled in terms of opprobrium and contumely; and, what is still more immediately to the present purpose, that the events of the pending prosecution should be discussed and the evidence assumed to be false; and that all this should occur, not merely in the provinces, but in the metropolis, almost in the precincts of the court and within the very district from which the persons are to come who are to pass in judgment between the Crown and the accused in the coming trial—how can we shut our eyes to the fact that there is here an outrage upon public decency and a great public scandal, and that the even and ordinary course of justice has here been unwarrantably interfered with? This court, therefore, cannot, under such circumstances, hesitate to exercise the authority which it undoubtedly possesses, for preventing the public discussion of any trial pending in the court. It has been attempted to be contended on your behalf that the meetings in question were convened solely for the purpose of obtaining money in order to enable the accused to carry on his defence, and with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that can be no excuse if the language used amounts to an unwarrantable interference with the course of justice. And when we find that gentlemen of your station and position, gentlemen of education, members of the Legislature, have condescended to lend themselves to proceedings of this character, and to hold such language as

you have used on these occasions, we can only contemplate your conduct with astonishment and regret. When it is said that all this was done without any consciousness that it was an offence against the public justice of this court, though it must have the effect of creating prejudice with reference to the approaching trial, I can only accept that apology as really derogatory to the understanding of those who make it. There cannot be the slightest doubt in the mind of any sensible man that such a course of proceeding must interfere with public justice. If it is open to those who take the part of the accused to discuss in public the merits of the prosecution in his interest; then it must be equally open to those who believe in his guilt to take a similar course on the other side. And then we may have, on the occasion of a political trial, or any case exciting great public interest, an organized system of public meetings throughout the country, at which the merits or the demerits of the accused may be discussed and canvassed on the one side and the other, and thus, by appeals such as you have not hesitated to make to public feeling in this case, the course of public justice may be interfered with and disturbed. It is clear that such comment upon a proceeding still pending is an offence against the administration of justice and a high contempt of the authority of this court. Nor can it make any difference in point of principle whether the observations are made in writing or in speeches at public meetings, and we can have no hesitation in applying to the one case the same rule as to the other. We think, therefore, that the counsel for the Crown have done no more than discharge their duty in bringing this case under our notice; and we must deal with it in such a way as to repress, if possible, such improper proceedings in future. We are glad to find that on this occasion, though attempts have been made to distinguish this case from others in which the court has interfered in the exercise of its summary authority, yet both parties have through their counsel submitted themselves to the court, and have given a clear and distinct pledge that they will take no part in such objectionable proceedings again. If there had been any hesitation in giving such a pledge, or the slightest appearance of it, and if there had not been the most submissive attitude assumed, the court would have thought it necessary to use to the full extent the power and authority it possesses, and would have inflicted a substantial fine and also a sentence of imprisonment in addition. We are happily spared the necessity of taking the latter course in consequence of the very proper line you have both of you adopted. But we wish it to be understood that in the fine we are about to impose we have gone to the extreme of moderation, and that if on any future occasion proceedings of this kind shall be resorted to, the full power of the court, which it immediately possesses to restrain and prevent such proceedings by the infliction of adequate punishment, will be certainly inflicted with a stern and unhesitating hand. The mischief in the present case, so far as the positive effect of these proceedings is concerned, has been very trifling indeed, thanks to the good sense of the metropolitan press in forbearing from giving publicity to these offensive and objectionable proceedings. But your intention was not the less reprehensible, nor your conduct the less open to severe censure. However, under all the circumstances we think that, considering the position you have taken and the pledge you have given, a pecuniary penalty of moderate amount—moderate with reference to the circumstances of the case and the aggravated character of the offence you have committed—will satisfy the exigencies of the case. But that leniency which we now exercise will be appealed to in vain if any other person shall be found guilty of a similar offence. The sentence of the court upon you is that for this contempt you do each pay a fine of 100*l.* to the Queen, and that you be imprisoned until the fine be paid.

Upon consulting the other judges, the Lord Chief Justice almost immediately added:

To persons of your position it is not necessary to apply the latter part of this sentence. The sentence of the court, therefore, is that you do each pay a fine of 100*l* to the Queen.

Jan. 21.—Cockburn, C. J. to-day made the following remarks with regard to this matter:—I find that an impression has gone forth that, in remitting that part of the sentence pronounced yesterday which imposed imprisonment until the fine was paid, I was influenced by the anticipation of some difficulty as to the imprisonment of members of Parliament by reason of some privilege which members of Parliament possess. This is an entire mistake, imprisonment being only imposed as a means of insuring payment of the fine. I was reminded by my brother Blackburn that payment might be enforced without having recourse to imprisonment, and it at once occurred to me that it was unnecessary—looking at the position of these gentlemen—that imprisonment should be imposed until the fine was paid, especially as there were other means of enforcing payment. On that

ground alone, that part of the judgment was recalled. I had intended to intimate in the judgment which, with the concurrence of the court, I pronounced, that if in the case itself there had not been a perfect submission to the court on the part of the defendants, and the clearest and most positive pledge that there would be no renewal of the conduct complained of, the sentence of imprisonment would have been added to the pecuniary penalty. The possibility of any collision with the House of Commons had not appeared to us as ever likely to occur, especially as in the case of Mr. Lechmere Charlton, who was committed by order of the Court of Chancery, the House of Commons declined to interfere on behalf the privilege of their members to prevent punishment by imprisonment for a contempt in the administration of justice. I was anxious that there should be no misunderstanding on a matter of such importance as this, and, therefore, I have thought it necessary to correct an impression which seems to have prevailed as to the grounds on which we proceeded in remitting that part of our judgment to which we have referred.

Was Dr. Kenealy justified in deploring the "Hogarthian sallies" of Mr. Hawkins, which have enlivened the dull monotony of a twice-told tale? There are some advocates who are incapable of a joke, and they go through a Nisi Prius cause in such sincere earnest that they remind the spectator of the story of Serjeant Manning, who, when arguing a point of black letter law, was asked by Justice Maule whether he was performing a religious ceremony. We cannot concur with the opinion that justice is in any way hindered or frustrated by a reasonable amount of fun, and we dread the period when Mr. Hawkins goes to the Bench. It would be vain to expect Mr. Hawkins to suppress a witticism except under circumstances in themselves altogether inconsistent with it, and his success is in no small degree owing to his capacity for making matters pleasant. Of this fact we had evidence recently, when Mr. Hawkins was retained in a road indictment. After the trial a juryman was commiserated by a travelling companion on the score of having had to try so dry a case on so hot a day. The juryman replied that he was amply rewarded by Mr. Hawkins's speech, which was one of the most amusing he had ever heard. Conceive an amusing speech in opening an indictment for stopping up a highway! We regret that we do not see Mr. Hawkins's successor in the ranks of the Bar. The junior Bar, we believe, are too serious about getting small business to think of cultivating the lighter vein of rhetoric, or rhetoric at all. We are approaching an era in the history of the Bar when the sober narrative will occupy the old thrones of humour and pathos. A thoroughly commercial spirit pervades the Profession, and Dr. Kenealy would stamp out the last sparks of a genius which is as rare as it is agreeable.—*Exchange.*

REVIEWS.

Revue Critique. Dawson Bros., Montreal, April, 1873.

This number is not perhaps as interesting as usual. The leading articles are on the Navigation laws of Canada, from the indefatigable pen of M. Girouard; Foreign Marriages, by Mr. Hatton, and an article calling attention to some objectionable legislation in the Province of Quebec.

Les Ans Du Roy Richard le Second. Collect' Ensembl' hors les abridgments De Statham Fitzherbert et Brooke. Per Richard Bellewe, de Lincoln's Inne, 1585. Reprinted from the original edition. London: Stevens & Haynes, Bell Yard, Temple Bar, 1869. In 8vo., £3 3s., bound in calf antique.

The publication of this volume is an extraordinary example of enterprise in legal bibliopoly.

"Bellewe's cases" of the reign of Richard II. follows the year books of Edward III. When first published it supplied the chasm existing between the third part of the year books and the year book of Henry IV. Bellewe is sometimes cited as the year book of Richard II.

Sir Mathew Hale, in speaking of the reports of Richard II., said, "We have no printed reports of this king's reign; but I have seen the entire years and terms thereat in a manuscript, out of which or some other copy thereof, I suppose Fitzherbert abstracted those broken cases

of this reign in his abridgment." (Hale's Common Law, 175.) Before the publication of these cases Bellewe published a work known as the "Cases Petit Brooke, temp. Henry VIII." "Bellewe's cases" is simply a collection of cases from old abridgments. The conclusion to his preface is as follows: "And as your good liking of my labour bestowed in the said collection of Brookes' newe cases did not a little prevaille with me in the publishing hereof; so if I shall perceive that these yeres of R. 2 do finde ye like favour at your handes, It may encourage me to set the Printer on worke for all such other olde yeres of other kings as lie scattered in the said abridgementes, and which I haue in a readiness at present. And so wishing vnto you all increase of learning, vertue and happines, I take my leave the 10 of Januarie, 1585." Mr. Wallace, in his work on the Reporters, says, "Whatever favor or whatever want of it the second publication may have found at the readers' hands, no other collection that I know of by Bellewe ever appeared in print." The number of copies which he published is not known, but Mr. Wallace says, "Bellewe's Cases T. Richard II. is very rare. Mr. Green, whose collection of reporters is complete, has a copy, the only one I ever saw, except the copy that I have myself."

The numerous enquiries for "Bellewe's Cases," and the exorbitant price which copies realized, led Messrs. Stevens & Haynes to believe that a reprint would be acceptable to the legal profession and to librarians who desire to possess a complete and perfect series of the English Law Reports. With characteristic energy they carried out the undertaking. The result is a *fac-simile* of Bellewe — old black letter type, &c. The *Law Times* has described it as "one of the most intelligible and interesting legal memorials of the middle ages." In this we readily concur. We are in delight with the book. It is such a charming specimen of antique printing as to be really a wonder. If Bellewe were to arise from his grave and shake off the dust of centuries, he would most assuredly, when looking at a copy of this reprint, come to the conclusion that in all things save spelling, paper and printing the world is progressive. Indeed, it would puzzle him to tell the difference between the copy which he had "imprinted at London, by Robert Robinson, dwelling at Fewter Lane, neere Holborne," in the year 1585, from the copy published by "Stevens & Haynes, Bell Yard, Temple Bar, London, 1869."

No public library in the world, where English law finds a place, should be without a copy of this edition of Bellewe. The price is comparatively high, but no higher than sufficient to cover the great expense incurred in publishing a small edition of this old collection of cases. We hope that the enterprising law publishers will not be pecuniary sufferers in this or any similar venture which partakes of a national character, and especially when their publications are said to be far superior to any of the works of a similar class recently published at the expense of the nation under the auspices of the Master of the Rolls.

The Practice of the High Court of Chancery, with the Nature of the several Offices belonging to that Court, and the Reports of many Cases wherein Relief hath been there had and where denyed, and known as "Choyce Cases in Chancery." Reprinted from the edition of 1672. London: Stevens & Haynes, Bell Yard, Temple Bar, 1870. In 8vo., £2 2s., calf antique.

Messrs. Stevens & Haynes were so far encouraged by the success which attended their publication in 1869 of the rare book known as "Bellewe's Cases temp. Richard II." that they brought out a reprint of a still more rare volume, known as "Choyce Cases in Chancery," temp. Mary, Elizabeth and James I.

Mr. Wallace, in his valuable work on Reports, published in 1855, said, "As the volume is quite rare, so rare indeed that except the copies in Temple Library and the Library of Lincoln's Inn, I have never seen more than one copy of it anywhere," and then, for the benefit of his readers, extracted and published some of the cases.

There are no less than 250 cases in the volume, the greater part of which bear date from 1576 to 1583 (19 to 26 Elizabeth). There is one case of 1 Elizabeth. There are a few cases from 1603 to 1605. (1 to 3 Jas. I.) and several of 5 and 6 Philip and Mary.

Speaking of the cases, Mr. Wallace says, "Like Lombard, Tothill and a few similar works, this volume is one which these great cases that occur from time to time and stimulate inquiry into the very foundations of legal science will occasionally call forth, and it ought therefore to be in every public law library."

There were two antique editions of the work, the first bearing date 1652, in which the practice unfolded ends at page 100. There is then a break in the paging, "Choyce Cases" beginning at page 113 and ending at page 188. In the 1672 edition, the "Choyce Cases" begin at page 105 and end at page 180. The reprint is from the edition of 1672, "printed for Abel Roper, at the sign of the 'Sun,' in Fleet Street, against St. Dunstan's Church."

The anonymous author of it, speaking of his own performance, said: "Courteous Reader. The title of this Book promiseth much, yet I dare assure thee no more than the body of it will afford. And although something of this subject hath been heretofore printed, yet (without prejudice to them) I may bolde say that none hath traced the path of truth so fully and clearly (in the particulars mentioned in the title) as the Composer of the ensuing discourse hath done. But knowing the proverb that *verbum sapienti sat*, and taking thee (reader) for one of that stamp, I am resolved not to forestal thy Judgment by further commendations of that which (being read and understood) will sufficiently commend itself. However, I shall desire thee to pardon and excuse the erratas (for without doubt there will be some) of the Transcriber and Printer; in confidence of which courtesie, I will give thee passage out of this short entry into the fairhouse of the following Tract. Vale."

We shall imitate the plan of the author and bring our remarks to a close, taking the reader, gentle or otherwise, to be one of the stamp described by the author—a stamp of readers not yet extinct, and many of whom, residents in Canada, are subscribers to the *Canada Law Journal*.

This volume, in paper, type and binding (like "Bellewe's Cases,") is a *facsimile* of the antique edition. All who buy the one should buy the other. They are companion volumes—of modern birth, but very old faces—so old as to deceive "Old Antiquity" himself, if alive.

Reports of Cases Argued and Adjudged in the Court of King's Bench, in the Seventh, Eighth, Ninth and Tenth Years of King George the Second, during which time the Right Honourable the Earl of Hardwicke was Lord Chief Justice of that Court. By T. Cunningham. The third edition, revised and corrected by Thomas Townsend Bucknill, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes, Bell Yard, Temple Bar, 1871. In 8vo., price £3 3s., calf antique.

The reasons which led Messrs. Stevens & Haynes to reprint "Bellewe's Cases" and "Choyce Cases in Chancery," have induced them to continue the re-issue of the English Reporters, and to select Cunningham's Reports as the third of the series.

These cases were taken by a gentleman of considerable business at the Bar of the King's Bench, during the time Lord Hardwicke presided in that Court. They were afterwards perused and approved by some persons eminent in the law, by whose advice and under whose inspection the editor committed them to the press.

Several of the cases in the volume were reprinted in Ridgeway's Seventh Modern, and Strange, but the Reports of Cunningham are, in the words of the advertisement, "fuller and more circumstantial, both in the state of the facts and in the arguments of the bar and the bench."

The reporter, in his preface, a modestly remarks: "As these cases are published without any recommendation of authority, they have nothing to rely on but their own intrinsic worth, whatever it is; and that, it is hoped, will be sufficient to support them, as it has done some books which came into the world as naked and friendless as this; but which soon broke through the obscurity of their birth by the lustre of their merit, and are now of established reputation, recognized by every Court of Judicature in the Kingdom; so universally true it is (what was said by a very great man, the highest living ornament of the law) that every case well reported speaks for itself, and reason is the best authority, and indeed in

matters of science, no other authority ought to be submitted to. All, therefore, that the editor has to wish is that these reports may have leave to speak for themselves, and that reason with respect to them may be allowed to stand in the place of authority."

The instructive chapter which precedes the cases, entitled "A proposal for rendering the Laws of England clear and certain," gives the volume a degree of peculiar interest, independent of the value of many of the reported cases. That chapter begins with words which ought, for the information of every people, to be printed in letters of gold. They are as follows—"Nothing conduces more to the peace and prosperity of every nation than good laws and the due execution of them." The history of the civil law is then rapidly traced. Next a history is given of English reporters, beginning with the reporters of the Year Books from 1 Ed. III. to 12 Hen. VIII.—being near 200 years—and afterwards to the time of the author. In speaking of the qualifications of a good reporter, he says: "A good reporter should have a liberal education, understand both the theory and practice of the law, be able clearly to comprehend the reasoning of the judges, and be ready at writing down what he hears in shorthand, or otherwise, and afterwards digesting it." So in his preface he says: "He is the best reporter, who relates the greatest number of circumstances of a case and the reasons of the Judge, most at large. And, indeed, by a too earnest desire to be concise the reporter often becomes obscure; an error of the worst kind, and which is here carefully avoided." This was remarkably good advice in 1770, and has, by very many calling themselves reporters, been since disregarded. If Cunningham were now alive we think he would be appalled at the number of companions one is obliged to place alongside of his, in bookshelves. With the increase of the number of volumes is increased the labour of those who are obliged to refer to them.

This volume of Cunningham's (like "Bellewe's Cases" and "Choyce Cases,") is, in type, paper, binding, &c., a *facsimile* of the original. The scarcity of the volume and consequent high price has been the inducement to the publishers to reprint the volume.

Sir George Cooke's Reports and Cases of Practice in the Court of Common Pleas, 1706 to 1747. The third edition, with the additional cases and references contained in MS. notes made by L. C. J. Eyre and Mr. Justice Nares. Edited by Thomas Townsend Bucknill, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes, 1872. In 8vo., £3 3s.

This is the fourth volume of Messrs. Stevens and Haynes' series of antique reports. Like its predecessors it is a *facsimile* of the original. Sir George Cooke was Chief Prothonotary of the Common Bench. His reports have long been out of print. They have at all times been in good repute and copies anxiously sought for. In 3 Wilson, 184, Sergeant Jephson, citing *Palmer* v. *Sir J. Edwards*, said, "See the case at length, for it seems well reported by that very able chief prothonotary of the C. B."

The reason given by the publishers for the selection of Sir George Cooke's Reports as the next volume in the series, was because of their having become possessed of a copy formerly belonging to Mr. Justice Nares, and containing numerous MS. notes. These notes appear to have been partly his own and partly copied from notes made by Chief Justice Eyre. The authenticity of these notes is confirmed by Mr. Justice Nares. In *Crossley* v. *Shaw*, 2 W. Bl., 1088, he is reported to have said, "I have seen a manuscript note of Chief Justice Eyre of the case of Rawlins and Parry, which agrees with Sir George Cooke's."

These additions will add greatly to the value of the original volume. They have been carefully revised by the editor.

The original volume was published "In the Savoy, Printed by Henry Lintot (assignee of Edward Sayer, Esq.), for J. Stephens, at the Hand and Star, in Fleet Street; J. Werrall, at the Dove, in Bell Yard, near Lincoln's Inn; T. Waller, at the Crown and Mitre, and W. Sandby, at the Ship, in Fleet Street, 1747." Law books never can die or remain long dead so long as Stevens & Haynes are willing to continue them or revive them when dead. It is certainly surprising to see with what facial accuracy an old volume of reports may be produced by these modern publishers, whose good taste is only equalled by their enterprise.

Sir Robert Brooke's new Cases in the time of Henry VIII., Edward VI., Queen Mary. Collected out of Brooke's Abridgment, and Chronologically arranged, together with March's Translation of Brooke's New Cases, reduced alphabetically, under the proper heads and titles, with a table of the principal matters. London: Stevens & Haynes, Bell Yard, Temple Bar, 1873. 8 vo., Price £4 4s.

Robert Brooke, whose name this volume bears, was son of Thomas Brooke, of Cleverley, in Shropshire, by Margaret, his wife, daughter of Hugh Grosvenor, of Earmont. He was born at Cleverley, in the County of Salop, laid a foundation of literature at Oxford, and was educated in the law at the Middle Temple, "where he became the completest lawyer of his time." In 1542 he was elected autumn reader of the Temple, and in the latter end of the year 1550, elected a double reader. In 1552, he was made Serjeant, and in 1554 returned to the House of Commons, of which he was elected Speaker. The marriage of Queen Mary with Philip of Spain is said to have been the object of the assembling of Parliament. The session has, however, been better known from Protestant historians, who revile it for its proceedings and penalties against heretics and the efforts to restore Papal power. Brooke was a zealous member of the Roman Catholic religion, and gave so much satisfaction to the Queen for his zeal in its cause that she made him Chief Justice of her Bench. This was in 1554. He died September 5th, 1558, and is buried in the chancel of Cleverley Church, where a fine monument in the north wall may yet be seen to his memory.

This volume was his first volume of reported cases. It is called "little," either because of the size of the volume, which was very diminutive in the early days of folios, or because the title of the original edition shows it is. "Ascvns Nouell cases de les ans et temp. Le Roy. H. 8, Ed. 6, et la Roygne Mary." "Ecrie ex le Graund Abridgment, composed per Robert Brooke, Chiualier tc. la disperse en les Titles. Mes Icy Collect, sub. ans.: Anno Do., 1578. Inœdibus Richardi Tottelli." The volume is occasionally cited as "Bellewe's Cases temp. Hen. VIII."

Though compiled by Bellewe there is no indication that he was the author, but in the very interesting epistle prefixed to the "Cases temp. Richard II." Bellewe states that the favour extended to his collection of "Brooke's New Cases," prevailed with him to publish another volume. His collection of "Brooke's New Cases" was published in 1578, seven years prior to his "Cases temp. Richard II." The "Cases temp. Richard II." was the last volume he published, though in the preface he indicated an intention to publish other volumes of collections of cases. He compiled the two collections upon different systems, one under years and the other under titles; but it would seem that the chronological arrangement was not so useful as the other, for March, in his translation of "Brooke's New Cases," has reduced them alphabetically under their proper titles.

Both the original and the translation having long been very scarce, and the mispaging and other errors in March's translation, making a new and corrected edition peculiarly desirable, Messrs. Stevens & Haynes have reprinted the two books in one volume, uniform with the preceding volume of the series of early reports.

This, like the other volumes of the series, is a *fac-simile* of the original. We notice that Kelgage's (W.) Reports and other volumes are in progress. We assume from the fact that the series is so regularly continued that the enterprise has not been a losing one. It cannot be a source of much profit considering the great expense of publication and the very limited edition that is likely to be in demand. If the publishers save themselves from actual loss they will, we understand, be satisfied. But as their public spirit demands a better reward, we hope there will be profit as well as compensation in store for them.

Ontario Law List, and Solicitor's Agency Book. By J. Rordans, Law Stationer. Seventh Edition. Rowsell & Hutchinson, 1873.

This Edition comes to us with many improvements and additions. It is now so well known, and so highly appreciated, that it is unnecessary to dilate upon its usefulness. We notice an improvement in the binding, which is very acceptable.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

DURING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.

No. 1268. James Stafford Kirkpatrick.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrick.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatcherd.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR OCTOBER.

1. Wed... Master and Reg in Chancery. Clerks and Deputy Clerks Crown to make return of fees.
5. SUN.. 17*th Sunday after Trinity.*
6. Mon... County Court Term begins.
10. Fri. .. Quebec Conference, 1864. Last day for Master and Reg. in Chancery, and Clerk and Deputy Clerk Crown to pay over fees to Provincial Treasurer.
11. Sat. .. County Court Term ends.
12. SUN.. 18*th Sunday after Trinity.*
15. Wed... Law of England introduced into Upper Canada, 1792.
18. Sat. .. *St. Luke.*
19. SUN.. 19*th Sunday after Trinity.*
21. Tues., Battle of Trafalgar, 1805.
25. Sat. .. Charge of Balaklava, 1854.
26. SUN.. 20*th Sunday after Trinity.*
28. Tues.. *SS. Simon and Jude.*
31. Fri. .. *All Hallows Eve.*

CONTENTS.

EDITORIALS:

Assessment of Bank Stock 288
Appeals to the Privy Council..... 277
Medico-Legal Men 278
Professional Etiquette 278
Judicial Comments in *McLean* v. *McKay*..... 278
Judges in Manitoba 279
New Ontario Election Act 279
Accident Insurance 284

SELECTIONS:

Foes and his "Biographia Juridica"..... 286
Liabilities of Executors 291
Lord Westbury 292

CANADA REPORTS:

Ontario:

Assessment Cases:

Appeals from the Court of Revision—

Assessment of Bank Stock 294

ENGLISH REPORTS:

Odger v. Mortimer—

Libel—Fair comment on public men—Function of jury 296

UNITED STATES REPORTS.

Supreme Court of Pennsylvania:

Boynton v. Housler et al..... 297
The Pennsylvania Railroad Co. v. Beale..... 298

DIGEST OF ENGLISH LAW REPORTS 299

REVIEWS:

High on Injunctions..... 303

LAW SOCIETY OF UPPER CANADA..... 304

THE

Canada Law Journal.

Toronto, October, 1873.

We publish in another place the judgment of Judge Boswell, of Cobourg, as to the legality of the assessment of Bank Stock; and, in a note to that case, we also refer to the decisions of other County Judges. So far as adjudicated cases go at present, they stand two to two. The majority of the County Judges at their recent meeting came to the conclusion that the assessments were illegal. We cannot say that as yet the matter has been so thoroughly discussed or so fully considered as to warrant any definite conclusion. It is possible that the subject may be adjudicated upon by one of the Superior Courts, should no preliminary objection bar the way.

The Judicial Committee of the Privy Council has been taking effectual steps to expedite the disposal of appeals depending before them. At present it is expected that all arrears will be cleared off before the end of the year, although some 195 cases are on the list to be heard, of which 19 are from different Provinces of the Dominion. With a view to the despatch of business an order has been promulgated providing that appeals are to be set down for hearing within a period not exceeding twelve months from the date of the arrival and registration of the transcript of appeal in England. Failing this, the Lords are to be at liberty to call upon the appellant to show cause why the appeal should not be dismissed for non-prosecution, and, if they shall so think fit, to recommend to Her Majesty the dismissal of any such appeal. No doubt, in case of a dismissal for non-prosecution, the appellant would be ordered to pay costs.

A paper was lately read before the Medico-Legal Society of New York, by Dr. Beard, in which he maintained that out of the fifty thousand physicians in the States, there were only one or two hundred whose opinion in difficult psychological cases would be of value in a court of justice. We fear that if accurate investigation were made, Ontario would not show more favourably in this matter. There is such rivalry in medical schools that the tendency is to multiply graduates, whose attainments are not at all in proportion to their numbers. We hope that the same infection is not about to extend to Universities which confer degrees in law. It is bad enough to have Q.C.'s flocking into court in such swarms that there is not room enough to receive them, but it will be more intolerable to have "Doctors of the Laws" thrust upon the profession, whose recommendation has been the capacity to run the gauntlet of a nominal examination.

It is a duty which we owe to the profession, as well as to ourselves, under the rules laid down for our guidance as journalists, to discountenance anything which can be looked upon as unprofessional or inconsistent with a nice sense of what is due to the honourable profession to which we belong. Our notice has been drawn to a circular, which calls the attention of practising attorneys at a distance to the fact, that the subscriber has been appointed Master and Deputy Registrar in Chancery, at a certain county town in Ontario, the name of which it is not necessary to mention. The circular then continues :—"Any Common Law Agency business entrusted to his care, will receive prompt attention." The person who thus seeks to bring himself to the attention of his brethren, should remember, in the first place, that he occupies a *quasi* judicial position, which is, by means of this circular, made to do duty in a way which is alike improper, unprofessional, and unfair to his fellow practitioners, who are obliged to depend upon their own merits for business, they being unable to present any attraction so glittering as that of Master and Deputy Registrar in Chancery. Were we inclined to joke on the subject, we might refer to the transparent logic which deduces the capacity of the advertiser for *Common Law* Agency business, from the bare fact of his being a local Judge in *Chancery*. But believing, as we do, that had our young friend thought twice on the subject, the circular would never have been written, we shall not pursue the subject further.

The case of *McLean* v. *McKay*, "an appeal from the Supreme Court of Judicature for the County of Halifax, in the Province of Nova Scotia, in the Dominion of Canada," has lately been decided by the Privy Council. The question was one upon the construction of an inartificially drawn clause in a deed of conveyance upon which the decree of the Judge in Equity, the Court of first instance, had been in the plaintiff's favour. The case was appealed to the Supreme Court, consisting of five judges, of whom the Judge in Equity was one. The Common Law judges were equally divided in opinion on the appeal, but the Equity Judge, having changed his first view of the case, turned the scale against his own decree. Sir Montague Smith, who delivered their Lordships' judgment, blandly regrets that the learned Judge in Equity should have found occasion to change the opinion to which he had originally come, for their Lordships were of the opinion that his first judgment was right. A little further on we find his Lordship indulging in a little pleasantry as to some alleged local usage in the town of New Glasgow, where was situate the land in question. He observes :"Soon after McLean pur-

chased the property he built upon it; but it is perhaps, not quite correct to say that he built upon it, because it appears to be the custom in that part of Nova Scotia to build houses and run them on the ground, and plant them there ready built." And finally at the conclusion of the judgment the Court lay down the rule that when a case comes before the Judicial Committee on appeal, their Lordships' will exercise their discretion in not regarding strictly the precise terms of the pleadings, and in deciding the case upon its merits. We are indebted for the report of the appeal to the *Weekly Reporter* (21 W. R., 798.)

JUDGES IN MANITOBA.

One of the inconveniences arising from a mixed nationality, when two languages are spoken and not mutually understood, is exemplified by an incident in a case recently heard before the Court of Queen's Bench, in Manitoba. It was apparently a simple action on a promissory note. The jury consisted, as is usually the case, of a jury composed partly of English and partly of French speaking inhabitants, and who were addressed by counsel in both languages.

Judge McKeagney, one of the two Puisne Judges, who was on the bench at the time on the conclusion of the case, charge the jury in English, and being unacquainted with French himself, was compelled to direct the Prothonotary of the Court to translate his speech into that language for the benefit of those jurors who were unable to understand the English language. Against this mode of action counsel for defendant objected, on the ground that it was the express duty of a Manitoban Judge to explain his meaning to the jury in both languages *himself*, and not to call on a third party to do so for him.

The Act regulating the Courts in Manitoba provides (see p. 12 *ante*) that all judges appointed under it must be able to speak both languages. We are not prepared to say whether this is a wise, or even a necessary provision, though possibly it may be said to be for a time at least expedient; nor do we know why a gentleman was selected who has not the required accomplishment if indeed at the time of his appointment the law required it. But one thing may we think be said with truth, and that is, that it is a great pity that the field for the selection of judges for the Province of Manitoba, should be, by virtue of the act referred to, limited practically to the Province of Quebec. We certainly think, and we say so without reference to the many complaints made, rightly or wrongly, against the judiciary of the latter Province, that the selection should be made from the largest circle possible; and we might add our belief, that the better a judge is grounded in the old Common Law of England as modified by modern statutes the more useful he is likely to be, and more especially so when, in the natural order of things, this new Province of Manitoba must eventually be overrun by the Anglo-Saxon race.

NEW ONTARIO ELECTION ACT.

(Continued from page 249.)

We promised last month to speak of the more important sections of the Act. Our remarks must of necessity be brief.

The first section repeals so much of the third section of The Controverted Elections Act of 1871 (34 Vict. cap. 3, O.) as defines "corrupt practices," or "corrupt practice," and enacts that these expressions "shall mean bribery, treating, and undue influence, or any of such offences, as defined by this or any Act of Legislature, or recognized by the common law of the Parliament of England; also, any violation of the forty-sixth, sixty-first, or seventy-first section of the Election Law

of 1868; and any violation of the sixty-sixth section of such last mentioned Act during the times appointed for polling." By the Act of 1871 "corrupt practices," or "corrupt practice," were defined to mean, "bribery and undue influence, and illegal and prohibited acts in reference to elections—or any of such offences—as defined by the Act of the Legislature."

The new definition settles two questions which were left in doubt by the Act of 1871. The first of these was whether all prohibited acts—whether such as would in their nature unduly influence an election, or not—should be considered as corrupt practices, so as to render void the election of the candidate committing them, and subject him to the penalties mentioned in the Act. Or whether those acts should alone be considered "prohibited acts" within the meaning of the definition, which partook of the nature of bribery and undue influence in their tendency to prevent the election from being free. The other question was whether the Common Law of the Parliament of England —or, as it has been otherwise termed, the Common Law of England in reference to parliamentary elections—applied (as far as it related to corrupt practices) to elections to the Legislative Assembly of Ontario. In some of the recent election cases this latter question was indirectly decided in the affirmative, but opinions to the contrary were expressed by two of the most prominent counsel at the bar.

These two questions, which arose under the late Provincial Statute, did not arise in England, for there it was enacted that "corrupt practices," or "corrupt practice," should "mean" bribery, treating and undue influence, "or any of such offences as defined by Act of Parliament, or recognized by the common law of parliament:" Imp. Stat. 31 & 32 Vict. cap. 125, sec. 3.

The present definition also expressly includes, under the term "corrupt practice," the violation of certain sections of the election act of 1868 (32 Vict. cap. 21, O.); namely—section 46, relating to the personation of voters, section 61, as to treating meetings of electors, section 71, as to the hiring of conveyances, and section 66, which directs that taverns shall be closed, and that no spirituous or fermented liquors shall be sold or given upon the day of polling, provided, however, as to the violation of this last mentioned section, that to constitute such violation a corrupt practice it must occur during the hours appointed for polling.

It is probable that the offences, or most of them, pointed out by these sections thus specially referred to, would have been held to come within the meaning of the general expressions used in the definition, but still it cannot be denied that it is better to remove all cause for doubt, and that the definition, as it now stands, will convey a more accurate idea of the actual state of the law to unprofessional persons than it would have done had the special references been omitted.

The second section of the Act repeals the much discussed sixty-first section of the Act of 1868, and enacts in lieu thereof, that "No candidate for the representation of any electoral division shall, nor shall any other person, either provide or furnish drink, or other entertainment, at the expense of such candidate, or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during such election, or pay, or promise or engage to pay for any such drink or other entertainment, except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors, by or at the expense of any person or persons, at his, her, or their usual place of residence." This section, as it formerly stood, declared that no candidate "with intent to promote his

election," or any other person "with intent to promote the election of such candidate," should furnish entertainment; the section as it now stands omits all reference to the intention of the candidate or other person furnishing entertainment. The word "drink" has also been added, as many electors appear to have held the idea that drink was not included under the term "entertainment," which was the only expression used in the original Act.

Section 3 repeals section sixty-nine of the Election Act of 1868, and section forty-six of the Controverted Elections Act of 1871, and the following is enacted in lieu of the latter section: "45 (1). When it is found upon the report of a judge upon an election petition that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate, if he has been elected, shall be void. (2.) When it is found by the report of a judge upon an election petition that any corrupt practice has been committed by or with the actual knowledge or consent of any candidate at an election, in addition to his election, if he has been elected, being void, he shall, during the eight years next after his being so found guilty, be incapable of being elected to and of sitting in the Legislative Assembly, and of being registered as a voter, and of voting at any election, and of holding any office at the nomination of the Crown, or of the Lieutenant Governor in Ontario, or any Municipal office." This section is intended to remove any misapprehension as to the effect upon the seat of a candidate of corrupt practices committed by his agents without his knowledge or consent. It does not introduce any new principles, but merely states in a connected form those principles which have been already acted upon in this Province, and which have been in force in England from time immemorial.

Section 4 makes an addition to the oath to be taken by an assessor on returning his assessment roll. He was formerly required to make the general statement that he had assessed all persons correctly, but the present section requires him to state that he has not "entered the name of any person at too low a rate, in order to deprive such person of a vote, or at too high a rate, in order to give such person a vote, or for any other reason whatever."

Section 5 enacts that no person disqualified from voting by section two of the Election Act of 1868 shall act as the agent of a candidate, under the same penalty as if he had voted contrary to that section. That section disqualified certain persons holding official positions, specified therein, from voting, and imposed a penalty of two thousand dollars on any one violating its provisions.

The sixth section of the Act makes an addition to the oath which a person tendering his vote may be required to take, such addition being to the effect that he has not directly or indirectly paid or promised anything to any person, either to induce him to vote or to refrain from voting at the election. Formerly the person tendering his vote could only be required to swear that he had not received anything, but he was not obliged to make a statement as to whether he had given anything. It is to be hoped that the operation of this section will prove beneficial in tending to diminish bribery, for there are many persons, possessing a certain degree of respectability and great influence in election matters, who, although they would reject any bribe offered to themselves, yet can see no objection whatever to their own attempts to bribe others.

Sections 7-12 of the Act relate to the subject of election expenses and election accounts, and, as far as this Province is

concerned, introduce an entirely new system, although enactments to the same effect have been long in force in England. These sections follow, with a few unimportant alterations, the Imperial Statute 26 Victoria, cap. 29, which was founded on certain provisions of the Corrupt Practices Prevention Act of 1854 (Imp. stat. 17 & 18 Vict. cap. 102).

By section 7 candidates are required to appoint agents for payment of election expenses, whose names and addresses are to be given in writing to the returning officer on or before the day of nomination, and no payment (except in respect of the personal expenses of the candidate), and no advance, loan or deposit for the purposes of the election, is to be made by or on behalf of the candidate, either before, during or after the election, except through an agent so appointed. The returning officer is required, by section 8, to publish the names and addresses of the agents in a local paper, either on or before the nomination day, and is also, on that day, to announce the names and addresses from the hustings.

Section 10 requires that all bills and claims upon the candidate, in respect of the election, shall be sent to an agent for election expenses within one month from the day of the declaration of the election, otherwise the claim shall be barred; provided, however, that no claim is to be paid or allowed until approved of by the candidate.

The Act also makes provision for the case of the death of any person having a claim against the candidate; or for the death or incapacity to act of any agent.

Section 11 enacts that a detailed statement of all election expenses shall be made out and signed by the agent or agents within two months after the election, and shall be delivered, with all bills and vouchers, to the returning officer, who is required, within fourteen days, to insert an abstract of the statement in a local newspaper.

By section 12 the returning officer is required to preserve the bills and vouchers, and to permit them to be inspected by all voters wishing to examine them.

Sections 13-27 of the Act provide for the preliminary examination of parties to petitions, and others, and the production of documents. These sections introduce, in substance, the practice of the Court of Chancery relating to the examination of parties and production of documents; and they follow very closely the English Chancery Act of 1852: (Imp. stat. 15 & 16 Vict. cap. 86.) Section 13 enacts that any party to the petition may, at any time after the petition is at issue, be examined before an examiner by a party adverse in point of interest touching any matter raised by the petition, and the examination may be followed by a cross-examination and re-examination. A petition is to be deemed at issue as soon as the security to be given by the petitioner has been approved of. (See 34 Vict. cap. 3, s. 9, O.) Section 14 provides that when a seat has been claimed for a candidate, such candidate, although not a party to the petition, may be examined as if he were a petitioner.

Depositions taken under the provisions of the Act are to be committed to writing, and may be used upon the trial of the petition.

With reference to the production of documents, it is enacted by section 23 that any party to a petition may obtain, as of course, a rule requiring the adverse party to produce, within ten days, upon oath, all documents in his custody or power relating to the matter in question, and to deposit the same with the Clerk of the Court. And it is provided further, that when a party called upon to produce, wishes to avail himself of any privilege entitling him to withhold any document, he must state in his affidavit of production the grounds on which he

claims such privilege. The schedule to the Act contains a form of affidavit or production, which, *mutatis mutandis*, is the same as the form of affidavit on production set out in schedule G to the Consolidated General Orders of the Court of Chancery.

The next ten sections of the Act, 28 to 37, relate to the subject of scrutiny, or the separate examination into the validity of the individual votes polled, in order to ascertain which candidate has obtained a legal majority.

According to the system heretofore in force, a scrutiny has been conducted by the court in the same manner as the general charges in the petition. This process, as may be supposed, has proved very cumbersome; and the expense attendant upon it has been so great, as practically to render a lengthened scrutiny impossible. In England the taking of a scrutiny has not, as a rule, been attended with a correspondingly great expense. For there a species of judicial investigation is made annually before a functionary styled a Revising Barrister, in order to test the qualification of those persons who are entered upon the list of voters, or claim the right of being so entered. This process necessarily disposes of all those simpler cases, such as constitute the large majority upon the scrutiny lists in this Province, and the number of votes to be examined by such an expensive tribunal as the Court is therefore comparatively small.

Some persons have been in favour of introducing the English system here, but objection has been taken to it upon the ground of expense; as, in order to carry out the English system in such a way as to avoid unfairness and irregularity, it would be necessary to examine the voters' lists every year, and not merely when one of the ordinary general elections was anticipated. And further, that this annual examination of votes must take place in every constituency through the Province, although the probabilities always are that the majority of the returns will not be petitioned against. Under these circumstances it is contended, that although the English system may diminish the expense to the individuals proceeding under any particular election petition, yet the expense to the country at large would be too great to warrant its adoption.

Another objection has been urged against the introduction of the English system — though it may be doubted whether much weight should be attached to it—on the ground that the organization of political parties is not as perfect in this country as in England, and therefore the same pains would not be taken to cause a thorough examination of the voters' lists before the revising barrister, and consequently that the same accuracy in those lists would not be secured.

In framing the new Act, the Legislature appears to have considered it inadvisable to adopt the English system, and has sought to avoid the expense of that system by authorizing a judicial examination of the qualification of voters in those cases only where a petition has been filed, and also to remedy the evils of the system formerly in force here, by substituting an inexpensive mode of taking the scrutiny for the former expensive one by the Court.

By section 28 it is enacted that the judge, before whom the petition is to be heard, may appoint a time and place in every local municipality in the constituency, for entering into a scrutiny of those votes polled in that municipality, to which objection has been taken. By a subsequent section, it is provided that the scrutiny may be entered into before the judge himself, or he may appoint his registrar, or some other person, being a barrister and competent for the purpose, to act in his stead. It is further enacted that where the scrutiny is before a person

appointed by the judge to act in his stead, the evidence must be taken down in writing; and before the close of the scrutiny, all questions of law and fact are to be decided or reserved for the decision of the judge; a note in writing of such decision or reservation is to be made for the information of the judge; and the decision or reservation is to be publicly announced for the information of the public and the parties interested. When any party is dissatisfied with the decision of the person delegated by the judge to take the scrutiny, he may appeal to the judge against the decision; provided that the judge may on the trial before him refuse to consider any points not raised before his delegate; and in case he do consider the same, and allow the appeal on a ground not distinctly taken before the delegate, the judge may order the appellant, though successful, to pay the costs of and incidental to the appeal.

It is obvious that these new enactments must at all events diminish the expense and inconvenience entailed by the former system, which required all the witnesses on the scrutiny to attend—often at long distances from their places of residence—and during the trial of all the questions raised by the petition, the decision of some of which might render their attendance quite unnecessary.

The remaining sections of the statute relate to certain miscellaneous matters, among which, it may be observed that members of the Legislative Assembly are now authorized to act as counsel, agents or attorneys in election cases, their former disabilities having been removed.

It is sincerely to be hoped that these provisions, many of which have been found to work well in England, will help to diminish in a marked manner the evils of bribery, which are second only to the degrading influences of the falsehood and hypocrisy which is so generally the issue of political strife.

ACCIDENT INSURANCE.

The subject of accident insurance is discussed at some length in the last number of the *American Law Review*, and the few cases in point collected and commented upon. In his introductory remarks the writer says:—

"Accident insurance is of modern origin. The French in the seventeenth century appear to have conceived the idea; but the earliest English company was formed in London in 1848, and the first American company is only ten years old. The continental system of appraising organs at specified sums, and paying a fixed rate for a broken leg or a lost eye, has never found favor in America. Upwards of twenty-three accident companies have been organized here which have now passed away, like Mr. Oldbuck's ghost, who disappeared with a melodious twang and an unsavory odor. Their memory is not sweet to those who hold unsatisfied judgments against them. The Travellers' Insurance Company of Hartford, and its offshoot, the Railway Passengers' Assurance Company, remain almost alone, but occupy the field successfully and redeem this branch of insurance from the discredit which their defunct contemporaries brought upon it. The American system of accident insurance, and the rapid approximation toward sound science in law and practice which it exhibits, is chiefly due to this company. When first organized, it was intended chiefly to insure travellers, but it soon established a general accident insurance, and afterwards combined it with life insurance. No accident tables have yet been published, and the statistics as yet are insufficient to generalize with accuracy results like those of the life tables. It is, however, well settled that in general accident insurance hardly more than seven per cent of claims arise from accidents in travel by rail or water, while those growing out of horse or carriage injuries exceed in number those arising from all other causes combined.

The idea of American accident insurance was borrowed from England, but in adapting its principles to the customs and habits of this country, the conditions of society, the occupations of the people, and the risks of accident, it was found necessary to construct new tables of rates, new classifications of risks, and new methods of business. The result was the general failure of companies which sought to do business by mere imitation, instead of attempt-

ing the scientific construction of a sound system of insurance. The pioneer company is fairly entitled to the credit of developing this system, and proving that the principle of average can be skilfully generalized into a real protection against loss by accidental bodily injuries. It now is the largest and best arranged accident company in the world, having issued during the ten years of its existence over 250,000 general accident policies and paid more than $2,000,000 on over 17,000 claims; an average compensation for losses equal to about seven hundred dollars a day for every secular day the company has done business.

Probably most persons imagine that, in these days of frequent casualty on land and sea in public conveyances, accident insurance is designed for travellers chiefly. The reported cases, however, suggest the mistake of this supposition, and in fact accidents from travel are only a small part of the losses for which compensation is paid. Since the Travellers' Company is the most successful association, as well as the oldest, the discussion of the subject becomes of necessity, in its present form, little more than an examination of its policy and practice, although its defunct rivals have contributed something to the law of such insurance, and some of them have left in the reports decided indications not only why they failed but how well it is for the public that they died.

Accident insurance in this country began with the sale of "accident tickets" to travellers on railroads. They were of three classes: insuring the passenger, first, against accidents to the conveyance; second, against all sorts of accidents while travelling by public conveyance; third, against all accidents set forth in the contract, without reference to conveyance, mode of travel, or occupation. These tickets were sold at railroad stations. By common agreement, however, of all the American companies, this branch of insurance was at an early day given up to the Railway Passengers' Assurance Company, which was owned by all the companies, and is now under control of the Travellers' Insurance Company. These tickets cover only a specific journey, or a short period of time, and contain the same general provisions as the common policy.

The policy grants a limited insurance. It insures either indemnity for injury by payment of a specified weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum if the insured dies in consequence of an accident. These two forms of insurance are issued separately or in a joint policy covering both indemnity and compensation. The policy now in use covers all "bodily injuries effected through *external, violent, and accidental means.*" Indemnity is limited to twenty-six weeks, and exception is expressly made against all forms of disease, drunkenness, duelling, suicide, self-inflicted injuries, and wilful exposure to unnecessary risk. Formerly the word "external" was not inserted, but now, in order to guard against frauds, the injury must be from some external means and produce a visible injury. Death must occur within ninety days from the happening of the accident to entitle the insured to compensation, and indemnity is not earned except it totally disables him from prosecuting any and every kind of business for the continuous period for which it is claimed. These are the peculiar provisions of an accident policy, which otherwise resembles an ordinary life policy, though in its effect and analogy accident insurance more closely resembles fire insurance than life insurance, and is truly a provision for indemnity except in cases of death, when it becomes a contract to pay a fixed sum of money upon the happening of death caused by accident. The form of the policy has been changed frequently in order to adapt it to new judicial decisions, and too little regard is had to the expediency of retaining the form of words which has been judicially construed, and thus expressing the rights of all parties by a contract which gradually becomes quite exact in its construction. Indeed the introduction of certain phrases from time to time shows the effect and marks the date of certain legal controversies, and makes a file of policies of successive years a condensed history of the law of this department of insurance.

What is an accident? The term, as used in policies, has been several times defined in the adjudicated cases. It is "any event which takes place without the foresight or expectation of the person acted upon or affected by the event." * The same definition is substantially adopted in Maryland.† It is "an unusual and unexpected result attending the performance of a usual and necessary act." It is "any unexpected event which happens as by chance, or which does not take place according to the usual course of things," ‡ It is something

* Withey, J. in *Ripley* v. *Railway Passengers' Assurance Co.*, U. S. Circuit Court for Western District of Michigan (1870); reported 2 Big. Cases, 738.

† *Prov. Life Ins. & Inv. Co.* v. *Martin*, 32 Maryland, 310.

‡ *North American Ins. Co.* v. *Burroughs*, 28 Legal Intell. 342; s. c. 69 Pa. St. 43.

which takes place without any intelligent or apparent cause, without design, and out of course. * "Some violence, casualty, or *vis major* is necessarily involved" in the term accident.† It means, in short, in the insurance policies, an injury which happens, by reason of some violence, casualty, or *vis major* to the assured, without his design or consent or voluntary co-operation. "Violent and accidental" are equivalent in meaning to "accidental violence,"‡ and every injury caused by accident, save those specially excepted by the policy, is covered by it.§ A full discussion of what an accident is, will be found in *Schneider* v. *Prov. Life. Ins. Co.*, 24 Wis. 28.

SELECTIONS.

FOSS AND HIS "BIOGRAPHIA JURIDICA."

(Continued from p. 256.)

Sir John Maynard, of whom much has been said, for and against, used to call the law 'ars bablativa,' and—

"Delighted so much in his profession that he always carried one of the Year Books in his coach for his diversion, saying that it was as good to him as a comedy. His passion for law ruled him to such a degree that he left a will purposely worded so as to cause litigation, in order that sundry questions, which had been 'moot points' in his lifetime, might be settled for the benefit of posterity. Judge Jeffreys is said to have availed himself of the serjeant's legal knowledge; but one day, when Maynard was arguing against judicial dictum, the coarse judge told him that 'he had grown so old as to forget his law.' 'Tis true, Sir George,' he retorted, 'I have forgotten more law than ever you knew.'"

Lord Thurlow used to say that Lord Mansfield was—

'A surprising man; ninety-nine times out of a hundred he was right in his opinions and decisions; and when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it. He was a wonderful man.'

The law's delays were much more general in former times than at the present day, and little effort was made to fetch up arrears. During the chancellorship of Lord Eldon the business of the Court of Chancery progressed but slowly, notwithstanding that on the one hand the proverbial dilatoriness, hesitation, and dubitation, displayed by his lordship in decisions was more than counterbalanced by the expeditiousness of his colleague, Vice-Chancellor Sir John Leach, who was notorious for the swiftness with which he disposed of the business which came before him. A line might well have been drawn between the two extremes. The rapid disposal of cases by the latter, owing to his extraordinary confidence in himself, led to much inconvenience, and unnecessary and harassing litigation.

'He relied so little upon authorities, and listened so indifferently to any arguments that conflicted with his own opinion, sometimes not even condescending to give any reasons for his judgments, that his decisions were frequently appealed against, and not unfrequently overturned. In comparing his summary judgments with Lord Eldon's proverbial delays, the chancellor's court was designated the court of *Oyer sans terminer*, and Sir John's that of *Terminer sans oyer*.'

On the other hand Lord Eldon justified himself in his delays by his over-anxiety to do strict justice to the litigants, and acted on the principle that extreme care was necessary to come to a right decision, inasmuch as it prevented not only the annoyance and expense of appeal, but also future litigation in the same class of subjects. His judgments are certainly not only treated with the greatest respect, but regarded as of the highest authority, while those of his colleagues were often reversed on appeal or overruled. The following epigram wittily gives the contrast:—

"In Equity's high court there are
Two sad extremes, 'tis clear:
Excessive slowness strikes us there,
Excessive quickness here.

"Their source, 'twixt good and evil, brings
A difficulty nice;
The first from Eldon's *virtue* springs,
The latter from his *Vice*."

A contemporary of Lord Eldon's, Sir Thomas Harris, Master of the Rolls, was another tedious judge. Although possess-

* *Mallory* v. *Travellers' Ins. Co.*, 47. N. Y. 52.

† Cockburn, C. J. in *Sinclair* v. *Maritime Passengers' Ass. Co.*, 3 El. & E. 478.

‡ *Riply* v. *Railway Passengers' Assurance Co.*, *ut supra*.

§ *Pro. Life Ins. & Inv. Co.* v. *Martin*, *ut supra*.

ing great powers and ability his style was so heavy and his speeches so long and elaborate that he fatigued his hearers without interesting them. His predecessor, Sir William Grant, notwithstanding his great dispatch, left an arrear of more than five hundred causes, a large number, accounted for, it is said, by the fact that suitors set their causes down for Sir William because Sir Thomas should not hear them. The following is said of him :—

"To cause delay in Lincoln's Inn
Two diff'rent methods tend :
His lordship's judgments ne'er begin,
His honour's never end."

Most judges, from time immemorial, have possessed some peculiar trait of character to distinguish them from others. Of course a volume, giving merely an outline of a person's career, deals largely in the principal distinguishing features. Therefore, any peculiarity in the manners, actions, and capabilities of the subject of the memoir is eagerly taken advantage of, and with all sorts of personal allusions of this kind the volume abounds. Thus it is noted of Alan Chambre, that a little more than a century ago he revived an ancient custom which had long been discontinued, of first resorting to an Inn of Chancery and paying the customary dozen of claret on admission into the society of Staple Inn, where his arms are emblazoned on a window in the hall. From this Inn he removed to the Middle Temple and Gray's Inn where he was called. On his appointment as a Baron of the Exchequer a short Act of Parliament was passed authorising, for the first time, a serjeant to receive his degree in the vacation so that the vacant office might be immediately granted to him.

Justice Page was known by the sobriquet of the 'hanging judge,' though it is doubted whether he really deserved the stigma. It is said :—

"When Crowle, the punning barrister, was on circuit with Page, on some one asking him if the judge was *just behind*, he replied, 'I don't know, but I am sure he never was "*just*" *before*.' When old and decrepit, the judge perpetrated an unconscious joke on himself. As he was coming out of court one day, shuffling along, an acquaintance enquired after his health. 'My dear sir,' he answered, 'you see I keep *hanging on, hanging on*.'"

For cruelty Jeffrey was the greatest monster that ever sat on the bench. Mr. Justice Foster designated him 'The very worst judge that ever disgraced Westminster Hall.' Coke, although in other respects a profound lawyer, acted with great harshness and cruelty towards prisoners placed before him for trial, particularly if for offences against the State.

Sir Richard Adams owed his elevation to the Bench of the Exchequer in 1753 to the king's admiration of him in the character of Recorder of the City of London. Several persons being suggested George II. called out, 'I vill have none of dese; give me de man wid de dying speech,' meaning the Recorder whose duty it was to report convicts under sentence of death.

Chief Justice Markham acquired the title of the 'upright judge,' because he eschewed corrupt practices and was superseded for impartiality and conscience sake.

Justice Hutton was called by King Charles, although he declared the imposition of ship-money to be illegal, 'the honest judge.' On his appointment Lord Chancellor Bacon addressed him as follows :—

"'The king, being duly informed of your learning, integrity, discretion, experience, means, and reputation in your country, hath thought fit not to leave you these talents to be employed upon yourself only, but to call you to serve himself and his people.' Among the counsels he gave were 'that you should draw your learning from your books, not out of your brain;' 'that you should be a light to jurors to open their eyes, but not a guide to lead them by the noses;' 'that your speech be with gravity as one of the sages of the law, and not talkative, nor with impertinent flying out to show learning;' and particularly 'that your hands, and the hands of your hands, I mean those about you, be clean and uncorrupt from gifts, from meddling with titles and from serving of turns, be they of great ones or small ones.'"

It is noted that it was a pity his own precept was not followed by himself.

Lord Talbot was not only distinguished as a lawyer but for his humanity and kindness to the distressed. The following story is told of him :—

"After he had promised a valuable living to a friend of Sir Robert Walpole, the

curate of the late incumbent called upon him with a petition from the parishioners, testifying to his merits and his poverty, and entreating his lordship to use his influence with the new rector to continue him in the curacy. After some little conversation with him and finding that his stipend was only £50 a-year, his lordship kindly promised not only to comply with the request, but also to do what he could to get the salary raised. When the rector-expectant came to thank him for his promise, his lordship mentioned the curate's petition and begged it might be granted. 'I should be happy to oblige your lordship,' replied the clergyman, 'but I have promised my curacy to a particular friend.' 'Promised your curacy! what, sir, before the living is yours?' 'Yes, my lord.' 'Then, sir,' exclaimed the Chancellor with warmth, 'I will afford you an admirable opportunity of dismissing your friend, I will dispose of the living elsewhere;' and, without suffering a reply, dismissed him. On the curate's waiting upon him to know the result of his application, he told him that he was sorry to say that he could not get him the curacy; but on the poor man bowing and offering to retire, the chancellor stopped him and said, 'Though I cannot give you the curacy, I can give you the living, and yours it is; so you may write to your family and tell them that, although you applied only for the curacy, your merit and your modesty have obtained for you the living.'"

A story, not unlike the foregoing, is told of Lord Thurlow, who has been as much praised for his learning as abused for his irregularities. Having offended against the rules of his college and being called before the authorities to explain his conduct, he made an offensive reply respecting the dean, before whom he had frequently appeared for various offences:

"Having answered on one occasion with some disrespect, was sharply asked 'whether he knew he was talking to the dean.' Thurlow, of course, answered, 'Yes, Mr. Dean,' and ever after when they met addressed him as 'Mr. Dean,' and so frequently reiterated the title that the dean felt himself insulted by the banter. If this story be true, there is a graceful pendant to it, for on the impudent youth becoming chancellor he sent for his old enemy, and on his entering the room addressed him as usual, 'How d'ye do, Mr. Dean?' 'My lord,' replied the other sullenly, 'I am not now a dean, and do not deserve the title.' 'But you are a dean,' said his lordship, giving him a paper of nomination; 'and so convinced am I that you will do honour to the appointment that I am sorry any part of my conduct should have given offence to so good a man.'"

Giles Rooke, a Justice of the Common Pleas, though not considered a deeply-read lawyer, nor very highly respected on the bench, was, nevertheless, a mild and merciful judge. The following is told of him:—

"A poor girl, having from the pressure of extreme want committed a theft, was tried before him and reluctantly convicted; and that, while applauding the jury for giving the inevitable verdict, he declared that he so sympathised with them in their hesitation that he would sentence her to the smallest punishment allowed by the law. He accordingly fined her one shilling, adding, 'If she has not one in her possession, I will give her one for the purpose.'"

Chief Justice Dyer also distinguished himself by his sympathy for the poor, and made himself the object of much indignation among the gentry at the Warwick Assizes in 1574, by the energy he displayed in supporting a poor widow against the oppression of a rich knight of the county, whose illegal proceedings were assisted by the bench of magistrates there.

"Thus he, with grace, the poore man's love did drawe,
And by sharpe meanes did keep the proude in awe."

Sir Francis Buller was equally celebrated among both females and males, but not with equal admiration. It is said of him:—

"While he is considered by the latter as one of the most learned of lawyers, he is stigmatised by the former as one of the most cruel of judges, since to him is attributed the obnoxious and ungentlemanly dictum that a husband may beat his wife, so that the stick with which he administers the castigation is not thicker than his thumb. It may perhaps restore him to the ladies' good graces to be told that, though the story was generally believed, and even made the subject of caricature,

yet, after searching investigation by the most able critics and antiquaries, no substantial evidence has been found that he ever expressed so ungallant an opinion."

The late Sir Lancelot Shadwell, when at the bar, submitted to a serious loss in a pecuniary sense by honourably confining himself to the Lord Chancellor's Court and not following the practice of taking briefs for other courts; not being able, to use his own expression:—

To induce himself to think that it is consistent with justice, much less with honour, to undertake to lead a cause, and either to forsake it altogether, or give it an imperfect, hasty, and divided attention—consequences that inevitably result from the attempt to conduct causes before two judges sitting at the same time in different places.

Sir Thomas More in his youth was impressed with strong religious feelings, but in time other attractions cured him of a good deal of his pious disposition. His son-in-law, Roper, thus simply relates his course of love:—

He resorted to the house of one Maister Colte, a gentleman of Essex, that had oft invited him thither, having three daughters, whose honest conversation and virtuous education provoked him there specially to set his affection. And albeit his mind most served him to the second daughter, for that he thought her the fairest and best favored, yet when he considered that it would be both great grief and some shame also to the eldest to see her youngest sister preferred before her in marriage, he then of a certain pity framed his fancy towards her, and soon after married her, never the more discontinuing his study of the law at Lincoln's Inn, but applying still the same until he was called to the bench, and had read there twice, which is as often as any judge of the law doth ordinarily read.

Many great and eminent lawyers have been distinguished for a retentive memory. Lord Eldon said of Chief Justice De Grey (Lord Walsingham), who was a most accomplished lawyer and of a most extraordinary power of memory:—

"I have seen him come into court with both hands wrapped up in flannel (from gout). He could not take a note and had no one to do so for him. I have known him try a cause which lasted nine or ten hours, and then from memory sum up all the evidence with the greatest correctness." *Twiss*, i. 113.

Sir William Grant too had a wonderful memory. The effect of a speech of his delivered in the House is thus described:—

"Quite a masterpiece of his peculiar and miraculous manner. Conceive an hour and a half of syllogisms strung together in the closest tissues, so artfully clear that you think every successive inference unavoidable; so rapid that you have no leisure to reflect where you have been brought from, or to see where you are to be carried; and so dry of ornament, or illustration, or reflection, that your attention is stretched—stretched—racked. All this is done without a single note."

Of the Bench generally so much is said of the learning and integrity of the judges that it would be invidious to point out one more than another. Considerable space is devoted to the account of the lives of some of our brightest luminaries, both ancient and modern. A little more than a century ago, in an interesting memoir of the celebrated Sir John Holt, we find the following:—

"After the succession of chief justices that disgraced the bench in the reigns of Charles and James since the death of Sir Matthew Hale, it is refreshing to recall a name which excites universal admiration, as possessed by one who was erudite in law, independent in character, and just and firm in his decisions. In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that perfect exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench, and which is now the undisputed glory of our judicature."

Of the judges who have died in harness during the present reign are Mr. Justice Talfourd, Mr. Baron Watson, and Mr. Justice Wightman, all from fits of apoplexy; the former in the middle of an effective address to the grand jury; Baron Watson after having just concluded his charge to the grand jury, and the latter while in the exercise of his duties at the assizes.

As showing the friendly terms on which the judges occasionally lived with each other, the following extract may serve to throw some light. Mr. Justice Williams in his will devised:—

"And, whereas it hath been heretofore agreed between my good and kind brother Warburton and myself that the survivor of us twayne should have the other's best scarlet robes, now I do will that my said good brother Warburton shall have the choice of either of my scarlet robes, and he to take that shall best like him, praying him that as he hath been a good and kind brother unto me so he will be a good and kind friend to my children."

A good deal is said about the Circuits and the Courts which cannot be here noted. Suffice it to say that in those days the Criminal and Common Law Courts were, in a sanitary point of view, much worse than they are at the present time, bad as some of them are. In 1750 the Black Sessions of the Old Bailey, at which an unusually large number of prisoners were arraigned, and a great concourse of persons assembled, no less than forty persons met with their death, among whom were Justice Abney, Baron Clarke, Sir Samuel Pennant, the Lord Mayor, Sir Daniel Lambert, and several of the counsel and jurymen. At the Summer Assizes at Bedford, at the trial of one Jenkes, "a scurvy, foul-mouthed bookseller," for scandalous words uttered against the Queen, every person in court was seized with such a malady, arising, it was believed, from the stench of the prisoners, that they all died within forty days to the number of three hundred. Among the victims were Chief Baron Bell, Serjeant Barham, and other lawyers and several gentlemen of the county.

In concluding our notice of this interesting volume, we give from the preface of the work a short account of the life of the author, who died while it was in the press:—

"Edward Foss, the eldest son of Edward Smith Foss and Anne, daughter of Dr. William Rose, of Chiswick, was born in Gough-square, Fleet-street, October 16, 1787. He was educated under Dr. Burney, at Greenwich, and in 1804 was articled to his father, who was a solicitor in Essex-street, Strand. In 1811 he became a partner, and on his father's death, in 1830, he succeeded to the whole business, which he carried on with a high reputation for ability and integrity. In 1827-8, when his friend Mr. Spottiswoode was one of the Sheriffs of London, he filled the office of Under-Sheriff. His professional work brought him into intercourse with most of the leading barristers of the day, so that, while he was able to turn to account his observation of the judges who then occupied the Bench, he could speak from nearer personal knowledge of many who, by later promotion, came to be included among the subjects of his biographical labors. In 1822 he became a member of the Inner Temple, with the intention of being called to the Bar; but he afterwards relinquished this plan, and continued to practice in his original branch of the legal profession until 1840, when he retired from business. In 1844 he removed to Canterbury. The change was one which for most men would have involved no small risk; for in too many cases it has been found that a withdrawal from a life of busy engagements to one of competence and leisure does not bring the happiness which had been expected; and so it might have been with Mr. Foss. He had little taste for country occupations or amusements; and although he took an active part in the public business of the neighborhood—among other things by acting as chairman of the Canterbury bench of magistrates, where his strong sense and his legal knowledge made his services very valuable—this was not enough to fill up his time. In his own words, he 'found that full employment was necessary to his own existence and happiness;'* and he was fortunately able to provide himself with the means of such employment. He had always felt a strong love of literature; he had already published some volumes, besides many contributions, both in prose and verse, to periodicals and newspapers; and he had early formed a project of writing the lives of all the English Judges. Through many years of busy London life he had kept this project steadily in view, and had gradually accumulated large stores of materials for carrying it into effect. These he now set himself to arrange, to complete, and to employ in composition; and the first two volumes of 'The Judges of England' were published in 1848.

"Although these volumes were at once noticed with high praise by some of the most esteemed critics, the general reception of them was not very encouraging. Lord Campbell, in his 'Lives of the

* Introduction to "Judges of England," p. xiii.

Chancellors,' had lately made the public familiar with a very different style of legal biography; and when readers came to take up Mr. Foss's account of the early judges with the expectation of finding it equally amusing with Lord Campbell's popular narratives, they could not but be disappointed. The Chancellors were commonly men who had played an important part in the history of their times: of the older judges the vast majority were utterly forgotten; as to many of them, it was necessary to enquire whether they ever existed at all, and, if so, whether they were judges or not; and perhaps nothing more could be ascertained, after all possible enquiry, than that their signatures were found attached to certain documents, and so prove them to have been in certain places at certain times. It was unfortunate for the author that the portion of his book which was first published should be that in which the names for the most part had nothing of attraction for the generality of readers, and were incapable of being invested with any other interest than that which arises from skilful investigation and scrupulous correctness.

"The two volumes, therefore, could not be regarded as at first very successful. But Mr. Foss knew that he was doing a good and substantial work; he felt that in it he had found a source of continual interest, the chief occupation of his life; and he determined to persevere even if the publication involved (as at one time it seemed not unlikely) a considerable pecuniary loss. The third and fourth volumes appeared in 1851; the fifth and sixth, in 1857; the last three in 1864.

"In the meantime the reputation of the book had been rising. The subject became more interesting as it advanced; the author's laborious research, his acuteness in enquiry, his sound and impartial judgment, were discerned and were warmly acknowledged, and long before the concluding volumes were published, the work had taken its place as one of historical authority. How valuable it is in this character may be in some degree understood from the continual references to it in D. Pauli's learned 'Geschichte von England;' nor was this by any means the only testimony which the author received of the appreciation which his work has found among German men of letters. In America also its reputation is well established; and resting, as that reputation does, on a foundation of solid merits, it is not likely to be disturbed.

"From the lives of judges, Mr. Foss was led on to the compilation of his 'Tabulæ Curiales;' and his last years were employed in the re-casting of his old materials with a view to the present publication.

"While engaged on these labours he removed to Addiscombe. The infirmities of age fell gently on him, and he retained to the last his powers of sight and hearing, with the full vigour of his mind. His death took place on July 27, 1870, and his remains are interred in the neighboring churchyard of Shirley. By those who knew him he will be remembered as a man of strong understanding, of thorough uprightness, and of a kind and generous heart.

"He was twice married. By his second marriage he has left six sons and three daughters. The eldest son, of whom, is Edward W. Foss, barrister of the Inner Temple.

"Mr. Foss was the author of several works, and contributed largely to the publications of the day."—*Law Magazine.*

LIABILITIES OF EXECUTORS.

The law relating to executors is not the only subject upon which the Court of the Rolls and the Vice-Chancellors have in recent years furnished conflicting, or perhaps we should say scarcely consistent, decisions. On this subject, however, we have now three cases which should be read carefully together—the case of *Coote* v. *Whittington*, before Sir Richard Mallins, on the 7th instant; *Rayner* v. *Koehler*, also decided by the Vice-Chancellor (27 L. T. Rep. N. S. 506; L. Rep. 14 Eq. 262); and *Cary* v. *Hills*, decided by Lord Romilly (L. Rep. 15 Eq. 79). To take the latter decision first—the head-note is "To a bill alleging that the defendant is executor, and had, before probate, possessed himself of the personal estate, and praying for general administration, a plea that the defendant is not executor is a complete answer." In *Rayner* v. *Koehler* the head-note is this, "A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the defendant,

the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the defendant, who was 'the only legal representative, and also heir of the undisposed of moveables and immoveables,' and that she had received and entered into possession of all the real and personal estate of the deceased. Plea, that if the defendant was not, or never had been, administratrix with will annexed, or legal representative of the deceased. Held, that if the defendant was not administratrix she was administratrix *de son tort*, and the bill could be sustained." In *Coote* v. *Whittington* the defendant was the widow of the intestate, and had not taken out administration, but had possessed herself of some of the estate. The case came from the County Court, where a preliminary objection was taken to the plaint, on the ground that a personal representative of the deceased was not a party to the suit, which was for administration, and before the Vice-Chancellor it was contended that a bill was not sustainable against an executor *de son tort* in the absence of the personal representatives of the decesed. From this doctrine the Vice-Chancellor expressed his emphatic dissent, and it is curious to observe the terms in which Lord Romilly and the Vice-Chancellor came to opposite conclusions. The former said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal representative before the court; if you were able to do so you would work great injustice." The Vice-Chancellor expressed the opinion that it was of the highest importance to the administration of justice that an executor *de son tort* should be liable. At present the Vice-Chancellor has the best of the argument, as *Cary* v. *Hills* was decided by Lord Romilly without giving reasons or citing cases. The Vice-Chancellor is fortified by authority. "From the Statute of Elizabeth," he said, "down to the case before the Master of the Rolls, the doctrine of the court has been uniform, that where a person had possessed himself of the assets of a deceased person, and had not properly clothed himself with the office of executor or administrator, he was liable to be sued as administrator *de son tort*. The maxim was that a person could not take advantage of his own wrong. A man could not say he was not an executor when he had acted as such." If the equitable doctrine was otherwise, law would provide a remedy where none existed in equity, for at law an executor *de son tort* may be sued.—*Law Times*.

LORD WESTBURY.

It is with much regret that we have to record the death of Lord Westbury. Although he had arrived at the ripe age of seventy-three years, and had for exactly half a century been in the law and of the law, his talents can at this moment be as ill-spared to the country as at any part of his long and useful career. His experience and authority would have been of great value in carrying the administration of the law over the transition period of 1874 and in starting the work of the new Court of Appeal; while in the single matter of the European Arbitration, his death will cause much obstruction of business, and may give rise to more than one difficulty. The profession also takes a just pride in the ex-Lord Chancellors. They are the mighty and venerable oaks of the legal *academus*. The position is surrounded with so much of honour, of respect, and of power in law and politics; they so completely represent the ideal and the actual height to which professional success under the constitution can carry the barrister of fortune, that the fall of one of them appears to be a loss to every disciple of the law. Not the less does this feeling affect us, when we reflect that the old is passing away, that all things are becoming new, and that ex-Lord Chancellors are no longer to occupy the same position which they have hitherto enjoyed and adorned, but are to be put back to work in the Court of Appeal, as though they had risen directly from the ranks, and had never sat on the Woolsack or had been custodians of the Great Seal.

The epithet 'clever' has been so much perverted from its proper sense that we scarcely like to apply it in eulogy. But the word exactly represents what Lord Westbury was. To matriculate at the age of fourteen years, to win a scholarship at college at the age of fifteen, and to obtain a first class in the classical and a second class in the mathematical schools at the age of eighteen, are peculiarly the

feats of a clever lad and a clever man. His was no case of drudgery working up to ability; of experience supplying the want of talent; of luck and 'backing' substituted for genius. He had as keen and bright an intellect as nature ever bestowed on man. Logical force, exquisite precision, abnormal memory, apt language—these were among the gifts or qualities which lifted Richard Bethell to the leadership of the bar, and gave Lord Westbury eminence as a judge. He was, as might be expected from the possession of such powers as these, a man of marvellous independence of thought and of judgment. He was the reverse of a slave to precedent. His judgments, indeed, are remarkable for their omission of reference to decided cases. In them broad principles and doctrines are asserted, and legal heresies are denounced in language bold, novel, and uncompromising. His arguments at the bar were the forerunners of his judgments on the bench. Had he held the Lord Chancellorship as long as Lord Eldon did, and been as thoroughly unchecked by other judges, he would have worked the law into new grooves, and changed much of the substance of our jurisprudence. From such results the law has been saved by the authority of other judges, and perhaps to the advantage of the law. But, as it is, Lord Westbury has left the impress of his almost revolutionary genius on the jurisprudence of the country, and has taught lawyers the rare art of thinking and judging for themselves.

In Parliament, in earlier days, both in the House of Commons and in the House of Lords, the oratory of Sir R. Bethell and of Lord Westbury could make itself felt. Unfortunately, the possession of unrivalled powers of sarcasm, capable of being expressed in tones of voice and with a manner by no means calculated to alleviate its bitterness, tempted him into assaults which his victims were not likely to forget or to forgive. But during the last five or six years of his life Lord Westbury was rather a popular character in the House of Lords. Age had softened his disposition, and his speeches always contained a fund of wit and humour, while his conversational powers were an unfailing source of amusement and entertainment in the intervals of business. His sincere regard and friendship for Lord Cairns also drew him from anything like strong partisanship in the House of Lords, and he seemed to strive rather to act the judge than the advocate in the political questions before the House.

To Lord Westbury is due the credit of some of the most important Acts of Parliament of modern times. The greatest marvel in accurate and ingenious legislation—we mean the Succession Duty Act—owed its passage through the House of Commons to the acute and precise explanations of the bill which he, as Solicitor-General, gave in aid of the Chancellor of the Exchequer. He also had the care of the Probate and Divorce Acts, and of the Fraudulent Trustees Act of 1857. His Bankruptcy Act of 1861 can hardly be reckoned a success; but the working of the measure was ruined by the false policy of erasing from the bill the clauses constituting a Chief Judge in Bankruptcy, contrary to the earnest advice of Sir R. Bethell. His warnings proved true, and in 1869 Parliament assented at last to what he had proposed eight years previously; and, although much injury has arisen from the persistent blunder of the Government in not appropriating a judge to the Court of Bankruptcy, yet the injury would have been far greater if no judge at all had been appointed.

We cannot close our criticism on the career of Lord Westbury without recalling his ardent and honourable exertions in establishing some system of education and examination for the bar. To his initiative is due the present activity of the Inns of Court, which bears a very marked contrast to the absolute inertia which prevailed before he interested himself in the question.—*Law Journal.*

Another Wisconsin man has fallen a martyr to the law which allows a woman to procure a policy of insurance on her husband's life. The companies remark, that under the present mixed condition of chemical expert testimony, it would be throwing good money after bad to dispute the claim, although they know where she bought the strychnine.

Of the present United States Senate it is stated that out of the 74 members, 46 are lawyers.

CANADA REPORTS.

ONTARIO.

ASSESSMENT CASES.

In the matter of the Appeals from the Court of Revision of the Town of Cobourg.

Assessment of Bank Stock.

Bank Stock is not personal property liable to assessment within the meaning of 32 Vict., cap. 36, sec. 4.

[Cobourg, July 10, 1873,—*Boswell, Co. J.*]

Appeals from the Court of Revision of the Town of Cobourg to His Honor the County Judge, who delivered the following judgment :—

Boswell, Co. J.—After as much consideration as the time permits, and not without very grave doubts, I have arrived at the conclusion that the Provincial Legislature, in the definition of personal property contained in the fourth section of the Assessment Act, (32 Vict: cap. 36) did not intend to include bank stock. At the time of the passing of that Act bank issues were liable to a duty, under the Act Con. Stat. Can., cap. 21, and the Provincial Legislature seem to have considered this a sufficient reason for exempting bank stock from assessment. The clause expressly exempting it (sec. 9, sub sec. 16) may be considered as enacted for the purpose of making their intention clear and as explanatory of the reason for exempting it. In the event of the removal of the tax on the issues, it may be assumed that the Provincial Legislature, before making the stock subject to assessment, might reasonably desire to consider all the stipulations and conditions attached to its removal.

The language of the section, although it seems on a casual reading to be most comprehensive, admits, I think, of the construction I give to it. Shares in incorporated companies are particularly specified, but not dividends from those shares, and dividends from bank stock expressly mentioned, while the clause is altogether silent as to bank stock itself. Both in this section and in the exempting clause, this species of property is defined as "stock," while property in other incorporated companies is called "shares." This, at least, shows that a distinction pervaded the mind of the framer of the Act. Then, if the stock be liable to assessment, both dividends and stock would be liable, and it is quite clear that the legislature did not intend to tax both. So important an item of property as bank stock would surely have been specified if it had been intended that it should be included as personal property liable to assessment as soon as the tax on issues was removed, and without further legislation.

Should the section defining personal property not admit of the construction I have put on it, and its language be held to comprehend bank stock, then it would be necessary to consider the questions, raised by the learned counsel for the appellants, whether the Act imposing the tax has been so entirely repealed as to deprive the stock of the benefit of the exemption contemplated in the Assessment Act.

The exempting clause protects the stock from assessment "so long as there is a special tax on bank issues." The Dominion Act (34 Vict: cap. 5, sec. 15) "exempts every bank to which that Act applies from the tax now imposed, * * * to which other banks," the same section goes on to express, "will continue liable." Section 73 of the same Act enacts that "this Act shall not apply to any now existing bank not mentioned in the schedule," contemplating clearly that other banks were in existence which would be still liable to the tax. Then the repealing section of the Act (sec. 76) is altogether silent respecting the Act imposing the tax. It cannot therefore be said that there is no longer "a special tax on bank issues," and if we were confined to strict grammatical construction, without being at liberty to consider the intention of the legislature, it must be admitted that the language of the exempting clause would still protect the banks in question from assessment, because a special tax on bank issues is in fact still continued by the Dominion Act.

I do not deem this fact conclusive, and I doubt whether I should have adopted the construction contended for, had it been necessary to decide this point. I am not prepared, on the other hand, to say that the argument is fallacious. The language in the exemption clause of the Assessment Act may have been framed with a view to protect from assessment the stock of banks coming within the meaning of sec. 5 of the Act, Con. Stat. Canada, cap. 21. By this section, which imposed the duty on bank issues, banks complying with the Act respecting banks and freedom of banking (Con. Stat. Can., cap. 55), are, upon certain conditions, expressly relieved from the tax on issues. Whether any banks availed themselves of that section or not this court is not at present advised, but I am strongly of opinion that the stock of a bank in operation under that section, and consequently paying no duty on its issues, would have been

held to be free from assessment. The section was intended to favour those banks which adopted the system there proposed, and the restrictions imposed by the section were considered a burthen equal to the tax and in lieu of it. The Provincial Legislature, it may be well argued, could never have intended such gross injustice as to make the stock subject to an assessment, which would have had the effect of taxing these banks which the Act intended to favour far beyond the banks which were in express terms freed from assessment in consequence of the duty to which they were already subject. If this view be correct, and to me it seems very reasonable, then the further question arises whether there may not be an equivalent for the tax in the enactments of the Dominion Act, which relieves the banks specially enumerated from the tax upon their issues. If the tax be remitted only upon a condition of some restriction equal to and intended to be in place of the tax, the reason for exemption would be still applicable.

This reasoning at least raises a claim for an interpretation against the assessment if there be a doubt, and a doubt will, I think, be entertained by every one who gives consideration to the subject. I am clearly of opinion, therefore, that the stock should not be assessed until the Provincial Legislature has been afforded the opportunity of considering the effect of the Dominion Act exempting the issues from taxation.

I should have desired, before coming to a decision in this matter, to have taken much longer time for consideration, had it been possible, but the assessment rolls must be finally settled by the fifteenth of this month and further delay might prevent the necessary amendments of the rolls in conformity to the opinion I have so far formed.

The matter is of less importance, as the decision will, in all probability, be of no importance after the current year, as the legislature, before another period for assessment comes round will, I have no doubt, have passed an Act explanatory of their views.

To have assessed the parties who have appealed would, to some extent, have been exceptional, In the municipality of Cobourg, for instance, where a very large amount of stock is held by a private savings bank and other parties, the Court of Revision have determined that the stock is exempt from taxation. No appeal has been made from that decision. I have, however, endeavoured not to permit this fact to influence my opinion, but to arrive at a conclusion founded only on the language of the Act and what I conceive to have been the intention of the legislature.

Appeals allowed.

(Note by the Editors C. L. J.)

The same point came before the learned judge of the County Court of Peterboro', who arrived at the same conclusion. He did not, however, give a written judgment:

His Honor Judge Wilson, of Norfolk, who holds that Bank Stock is liable to Assessment, has kindly sent us an extract from a paper he read before the County Judges at their recent meeting, in which he says:—

"I think the Appellants' contention that under Confederation Act Bank Stock cannot be assessed, is untenable, as this is not a question concerning 'Banking,' but 'Assessment.' As to the further contention, that sec. 4 of the Banking Act of 1870 virtually taxes the issues, I think it also untenable, as sec. 5 of that Act expressly exempts the issues from taxation; and, the other question is not whether sec. 4 operates prejudicially to holders of bank stock or not, but simply whether there is a special tax on these issues or not. It may be suggested that the abolition of the tax on the issues was intended by the Legislature as a *compensation* for the deprivation of the right to issue notes for less than four dollars, and any other burdens that the abolition of such tax might entail on the stockholders, and that therefore the holder of bank stock is virtually in no worse position than if the tax on the issues had been retained. However, whatever the intention of the Legislature or the effect of this enactment, all that we have to enquire into is, whether there is a special tax on these issues or not, and I think clearly there is not. As to the Appellants' last contention, I do not think that stock in banks, with head offices out of Ontario, can be said to be 'personal property,' owned *out* of this Province, where the owners of such stock reside *in* this Province."

It may not be out of place here to reproduce the opinion of two eminent counsel (Hon. J. H. Cameron, Q.C., and Hon. Edward Blake, Q.C.), on the question being submitted to them by the Assessment Commissioner of the City of Toronto, already published in the proceedings of the City Council. The opinion is as follows:

"First.—By the Assessment Act the shares of incorporated companies were liable to municipal taxation in the hands of the stockholders, but the stock of banks was exempt from such taxation so long as the issues of such banks were liable to the general tax existing when the Assessment Act was passed, and this exemption being exceptional and temporary, ceased as to those banks, the issue of which are no longer taxable under the Banking Act; and therefore, in our opinion, such bank stock is now liable to municipal taxation, but we consider that bank dividends should not also be taxed, although we do not say that they are not taxable.

"Secondly.—The stock of any such bank doing business and having offices or agencies in Ontario, and the stock of which may be transferred by law, within Ontario, although the head office may be without this Province, is taxable as the personal property of the person owning the same and resident in this Province.

"Thirdly.—The stock is taxable at the time when the other personal property is assessed."

ENGLISH REPORTS.

Odger v. Mortimer.

Libel—Fair comment on public men—Function of jury.

In actions for libel, it is only on the very strongest grounds that the court will set aside, as against evidence, a verdict for the defendant on the question of fair comment upon the conduct of public men.

The plaintiff, a well-known public character, in addressing meetings held to protest against a Bill recently introduced into Parliament, had burnt the Bill, and predicted much popular irritation in event of its being passed. Thereupon the defendant published of him (amongst other things) that he was a political cheap Jack, half booby and half humbug, and had defied the Government and threatened civil discord, and that he was only seeking by agitation to obtain a Government appointment:

Held, a question for the jury, whether this was fair comment or not, and a rule to set aside, as, against evidence, a verdict for the defendant refused.

[April 18, 1873,—28 L.T. N.S. 472.]

Action for libel against the publisher of the *Figaro* newspaper.

The declaration set out the alleged libel, of which the following are the principal passages: —"Odger victorious. Know all men by these presents, that Odger the cobbler rules the Government of England. . . . We do not like the cobbler, we abhor his principles, we regard him as an enemy of order, we hold him to be a demagogue of the lowest type, half booby and half humbug, a political cheap Jack, who would be a political sharper if he had brains enough. . . . He defied Parliament and the Government. . . . He threatened an unprecedented demonstration and civil discord. Odger is victorious. The Government have modified their Bill. . . . What may be Odger's next fancy it is impossible to guess. Perhaps he may assert the right of the Odgerites to refresh themselves in West-end pantries and wine-cellars, or he may demand the release of all convicts who are so nearly connected with that section of the people which Odger the cobbler commands." . . .

A second count charged the defendant with publishing in his newspaper the following words:—"I have any quantity of bottled-up abuse, treason, and riot. I will exchange the whole lot for any permanent appointment with 250*l.* per annum and upwards. George Odger."

The defendant pleaded, first, not guilty; secondly, that the alleged defamatory matters were true in substance and in fact; and, thirdly, that the alleged defamatory matters were "fair and *bonâ fide* comments upon the acts and proceedings of the Government, and the several matters and premises therein referred to, and the acts and conduct of the plaintiff in reference thereto and as a public character," and were published as such comments, and "without any malicious intent or motive whatever."

The action was tried before Brett, J. and a special jury, at the Guildhall Sittings in Hilary Term. The defendant was the publisher of the *Figaro* newspaper, and had admitted publication of the alleged libels. The plaintiff, and other persons on his behalf, gave evidence that he had given his political services without remuneration, and had never applied for any Government appointment. He admitted that he had publicly burnt the Parks Regulation Bill, and used words to the effect that if it passed, the people would meet (but not in the parks) to assert their right of public meeting, and that the Bill would produce much popular irritation if it should become law. The plaintiff had attended and spoken at various meetings, at which the nationalisation of the land and other kindred topics were discussed, both in Trafalgar-square and in the public parks, and was a well-known advocate of advanced democratic opinions. The chief object of the Parks Regulation Bill was to regulate the delivery of public addresses in the parks.

The jury having found a general verdict for the defendant,

Simon, Serjt., now moved to set the verdict aside, as being against the weight of evidence, arguing that the private honour and honesty of the plaintiff had been attacked in the alleged libels.

Bovill, C.J.—I am clearly of opinion that the questions in this case were questions for the jury, in whom the law has placed the power of deciding the question of libel or no libel. It is only in cases where the court can see that the jury are clearly wrong that the court should interfere. Mr. Odger complains that his honour and honesty have been attacked, and if we could see clearly that this has been done, we might interfere for his protection; but, as a matter of fact, we see nothing of the kind. The jury, in considering their verdict, would look at all the circumstances, and the circumstances point to this—that Mr. Odger is essentially a public man. This being so, editors of public newspapers may comment in the strongest possible way upon what he says and does in that character. As for the ridicule complained of, that is often the strongest weapon in the hands of a public writer, and if it be used fairly, the presumption of malice which would otherwise

arise is rebutted, and it becomes necessary to give proof of actual malice, or of some indirect motive, or of a wish to gratify private spite. Everything has been urged on behalf of Mr. Odger that could possibly be urged, but I see no ground whatever for disturbing the verdict of the jury.

Grove, J.—I am of the same opinion. If there be a ground of action with which the court should hesitate to interfere with a jury more than any other, that ground of action is libel. It is now the law that libel or no libel is for the jury, and the court should not interfere, unless the ground for interference be overwhelmingly strong. If mere ridicule of a public man were enough to support an action for libel, every public newspaper—especially every comic newspaper—would be perpetually subject to have an action brought against it. The fact is, that public men must put up with laughing, caricaturing, and sneering. Now the question here was this:—was the alleged libel really a malignant attack on Mr. Odger's private character, or was it a holding up of his principles to derision? This question has been put to and answered by a jury, and the court could never say that a second jury is bound to entertain it again. Unless every electioneering squib is to be made the subject of an action, I do not see how we can possibly interfere, the defendant being entitled to the verdict upon the finding of the jury that the plea of justification was proved.

Denman, J.—I am of the same opinion, on the ground that the court would be interfering in a very mischievous way with the functions of the jury by granting the rule. Generally speaking, the court can only say of a document, whether it can be a libel, and it is then for the jury to say whether it be so or not; for the jury are guardians of freedom of public comment as well as of private character. The plaintiff here is emphatically a public man, and as such is *primâ facie* the proper subject of public comment. It was for the jury to say whether the comment went beyond what was fair and right. If I had been on the jury, I might perhaps have entertained the question whether a verdict in the plaintiff's favour for a small amount would have been right; but, at the same time, I should have been quite disposed to listen to anything my fellow-jurymen might say on the other side. My judgment is founded on the assumption that the jury found their verdict upon the plea of not guilty.

Honyman, J.—I am of the same opinion, and only wish to say that I do not wish it in any way to be understood that a newspaper may make its public comments a vehicle for attack on private character. However, here we have a special jury of the City of London finding, after great deliberation (on what plea it is immaterial), a verdict for the defendant in an action for libel, and I think that we cannot interfere.

Rule refused.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Boynton v. Housler et al.

Where one having an interest in land is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, an attempted denial by the latter of the confidence, is such a fraud as will convert the purchaser into a trustee *ex maleficio*.

[May 17th, 1873.]

Error to the Common Pleas of Cameron County.

Mercur, J. The plaintiff claims to recover this land under the title acquired at a sheriff's sale, when it was sold as the property of the estate of Merrick Housler, deceased. The defendant, who is the widow of the said Housler, made defence to a portion of said land called "The Homestead," containing about eighteen acres. Prior to, and at the time of, the sheriff's sale, the defendant and her minor children were in the actual possession of the whole property. She had entered into a contract to purchase it from Aden Housler, who held a deed for it subject to the payment of the plaintiffs. While thus holding whatever interest passed to her under this contract, as well as her right of dower, she made the arrangement with Simpson, under which he purchased at sheriff's sale.

The evidence given by the defendants, which the jury found to be true, was substantially this, to wit: Prior to the sheriff's sale the defendant had agreed with Aden Housler to bid off the whole land, provided it was not run up higher than $1,200 or $1,250, which was the value of the property, and if he became the purchaser he was to deed "The Homestead" to her. Upon the day next preceding the sale Simpson, who was the plaintiff in the execution, was informed of this arrangement between Aden Housler and the defendant. He then said to them if they would not interfere or bid at the sale, and have it bid off as low as possible, that she should have the homestead; she should not get any

bidders, and he would get some one to bid it off; that would be better than for her to bid it off. The defendant and Aden agreed to this proposition. Relying upon it they did not interfere nor bid at the sale; nor did she get any other person to bid for her. Simpson bid it off for $110. The plaintiff bought of him with full knowledge of this arrangement.

Under these facts the court below held that a trust *ex maleficio* arose in favor of the defendant as to the homestead.

All the errors assigned are substantially to this conclusion.

Where a parol contract for the purchase of land has been carried on *mala fide*, there is a resulting trust implied by law, and equity will decree a conveyance according to the terms of the contract: *McCulloch* v. *Cowher*, 5 W. & S. 427. Equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so if he has acquired it by means of his own fraud: *Sheriff* v. *Neal*, 6 Watts, 540. In *Morey* v. *Herrick*, 6 Harris, 128, Justice Bell said, "it is equally well settled that if one be induced to confide in the promise of another, that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne, or to forbear what he contemplated to do, in the acquisition of an estate, whereby the promissor becomes the holder of the legal title; an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio*." Where one holding an article of agreement for one hundred and sixteen acres of land, upon which he had paid five dollars only, and was liable to be turned off, surrendered his title under a parol contract that ten acres thereof should be conveyed to him so soon as the person for whose benefit he gave up his title acquired a deed for the legal title, it was held to create a trust *ex maleficio* in his favor as to the ten acres: *Plumer & Crary* v. *Reed*, 2 Wright, 46. Nor does it make any difference that the title was acquired by Simpson through the judicial sale: *Beegle* v. *Wentz*, 5 P. F. Smith, 369, and cases there cited. This case of *Beegle* v. *Wentz* was one in which a debtor was induced to relinquish his claim to the $300 exemption, and consented that the whole of his land be sold, under an agreement that the plaintiff was to take a sheriff's deed for the same and make to the debtor a deed for the part agreed upon. It was held that if the debtor was induced to surrender his right on the false assurance that the part should be left to him, the plaintiff refusing, was a trustee *ex maleficio*. This was since the Act of April 22, 1856, and was held to be such a trust or confidence as was not affected by that Act. The same principle is affirmed in *Seichrist's Appeal*, 16 P. F. Smith, 237.

It was contended, however, that inasmuch as the agreement between the defendant and Simpson was that she and her agents and friends should not bid at the sale, it was contrary to public policy, and therefore void. In support of this principle the case of *Slingluff* v. *Eckel*, 12 Harris, 472, is cited. We assent to the correctness of the law there declared, as applied to the facts in that case. That was an agreement between two persons, neither of whom has any possession of or interest in the land. The court there said: "What we do agree is, that one bidder cannot legally buy off another with money or the promise of money."

The distinction in this case is, that the defendant had an interest in the land in reference to which the contract was made, and she was to retain a portion of that land. This is a distinction clearly taken and recognized in *Beegle* v. *Wentz*, and in *Seichrist's Appeal*, *supra*.

Judgment affirmed.

—*Legal Intelligencer.*

The Pennsylvania Railroad Co. v. Beale.

It is evidence of contributory negligence if a person does not stop and look out for a locomotive before driving across a railroad track.

[July 2nd, 1873.]

Error to the Court of Common Pleas of Juniata county.

Sharswood, J. The evidence showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury which resulted in his death, was a dangerous one, and as he was well acquainted with it, there was the greater reason that he should exercise the utmost care and caution, by stopping at the railroad before undertaking to pass over. It is very clear that if he had done so, but for a few minutes, the accident would not have happened. "The evidence," said the learned judge in his charge, "is uncontradicted, that there was a level piece of ground about ten feet wide, between the hill or bluff, and the first track or siding on the approach to the track from the valley upon which the deceased was travelling." It was his plain duty to have stopped at that place, and so the learned judge instructed the jury, but he qualified the instruction by adding, "if you find from the evidence that the approach of the train might have been

seen or heard from there." This, in fact, left the question of negligence to the jury, upon a point not material. Indeed, the duty of stopping is more manifest where an approaching train cannot be seen or heard, than where it can. If the view of a track is unobstructed, and no train is seen or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision, none takes place, and the sooner the traveller is across the track the better. But the fact of collision shows the necessity there was of stopping, and therefore, in every case of collision the rule must be an unbending one. If the traveller cannot see the track by looking out, whether from fog or other causes, he should get out, and if necessary, lead his horse and waggon. A prudent and careful man would always do this, at such a place. In the *Hanover Railway Co.* v. *Coyle*, 5 P. F. Smith, 396, the plaintiff, a peddlar, in the depth of winter, was driving inside of his covered waggon, with his head muffled up in a thick overcoat, and it appeared, that a traveller passing in the direction he was going, could not see up and down until within sixteen feet of the track. Yet these circumstances were not allowed to form any excuse for his negligence in omitting to stop. There never was a more important principle settled, than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court: *North Pennsylvania Railroad Co.* v. *Heileman*, 13 Wright, 60. It was important, not so much to railway companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives—of passengers on trains—and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only, but to others. The error of submitting the question to the jury, whether, if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should, upon the uncontradicted evidence, have directed a verdict for the defendants.

Judgment reversed.

—*Legal Intelligencer.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR JANUARY, FEBRUARY, MARCH, AND APRIL, 1873.

(*From the American Law Review.*)

Account.—*See* Bank, 1, 2; Husband and Wife.

Action.—*See* Injunction, 1; Damages, 5.

Advancement.

M. purchased a copyhold cottage in the name of his son, who was admitted tenant. M. shortly afterward gave the occupying tenant notice to quit, but allowed her to remain at an increased rent. M. received the rents, paid the quit-rent and costs of repairs, and treated the cottage as his own. On M.'s death it was testified that M. intended the cottage to be his son's after M.'s death. *Held*, that the cottage was not purchased as a gift to the son, but was taken in his name as trustee for his father.—*Stock* v. *McAvoy*, L. R. 15 Eq. 55.

See Cy-Pres.

Affidavit.

Affidavits on behalf of the plaintiff taken before a notary-public in America, at a place one hundred and twenty miles distant from residence of any British consul, were allowed to be filed by the clerk of records and writs, with the written consent of the defendant.—*Lyle* v. *Ellwood*, L. R. 15 Eq. 67.

Agency.—*See* Principal and Agent.

Annuity.—*See* Payment; Penalty.

Arbitration.

In a matter of general average the ship-owner and the owner of the cargo agreed to refer the question to the defendant, an average adjuster. *Held*, that the defendant was acting as a *quasi* arbitrator, and was not liable for want of skill or for want of care, or for negligence, if he acted honestly.—*Tharsis Sulphur Co.* v. *Loftus*, L. R. 8 C. P. 1.

Assault.

It was held that there might be an indecent assault upon boys, although they submitted to the act in ignorance of its nature, without actual or active dissent.—*Queen* v. *Lock*, L. R. 2 C. C. 10.

Assignment.—*See* Priority.

Auction.—*See* Order of Court; Vendor and Purchaser.

Award.—*See* Penalty.

Digest of English Law Reports.

BANK.

1. The O. bank kept a loan account, a discount account, and a general account with the A. bank. The former bank was in the habit of borrowing from the latter, and depositing from time to time securities to meet these loans, which were entered to the loan account. The O. bank accordingly deposited three bills with the A. bank as security against certain drafts which it requested the A. bank to honor. *Held*, that the A. bank might hold the bills for the balance of the *general* account.—*In re European Bank. Agra Bank Claim*, L. R. 8 Ch. 41.

2. The plaintiff had a deposit on an account with the L. branch, and was indebted on another account at the B. branch of a bank. He drew against his account at the L. branch, but the bank set off his indebtedness at the B. branch. *Held*, that the bank was entitled to set off the indebtedness at the B. branch against the deposit at the L. branch.—*Garnett* v. *McKewan*, L. R. 8 Ex. 10.

See Husband and Wife.

BANKRUPTCY.

1. In December, 1870, W. bought of C. ten hogsheads of whiskey in bond at a warehouse, subject to the order of C. On February 19, 1872, W. wrote to C. directing him to send a specified hogshead, and enclosing a check in payment of duty and warehouse and clearing charges. On February 26, 1872, C. filed a petition in bankruptcy, at which time said hogshead was still in the warehouse subject to C.'s order, but transferred to the credit of W. on the books of C. *Held*, that said hogshead was not within the "possession, order, or disposition of the bankrupt by the consent and permission of the owner" within the meaning of the Bankruptcy Act, as possession had been demanded with a *bonâ fide* intention of taking possession before the bankruptcy.—*Ex parte Ward. In re Couston*, L. R. 8 Ch. 144.

2. L., knowing that his bankruptcy was impending, drew all his balance at the banker's and deposited it, on January 7, 1871, with K., his accountant, to whom a considerable sum was owing. K. refused to accept the money unless L. authorized him to pay himself his debt. L. authorized K. accordingly, having in fact drawn said balance that it might not be attached by creditors. K. had made no demand that his debt should be paid subsequent to December 23, 1870. *Held*, that drawing said balance from the bank as aforesaid, was an act of bankruptcy, and said payment to K. a fraudulent preference.—*Ex parte Halliday. In re Liebert*, L. R. 8 Ch. 283.

3. H. sold three hundred and thirty tons of bleaching powder to E., to be delivered thirty tons per month. The November instalment was delivered, but not paid for. In December, the month in which the last instalment was due, E. called a meeting of his creditors, and declared himself insolvent. Thereupon H. wrote, "we refuse to deliver any more bleaching powder upon contract." E. became bankrupt, and the trustee claimed damages from H. for breach of contract. *Held*, that though E.'s insolvency did not put an end to the contract, H. was not bound to deliver any more powder until the price of both November and December instalments was paid; and that said letter did not constitute a breach of the contract.—*Ex parte Chalmers. In re Edwards*, L. R. 8 Ch. 289.

See Bills and Notes; Indictment; Principal and Agent, 2; Priority, 1.

BEQUEST.—*See* Devise; Legacy.

BILL IN EQUITY.—*See* Executors and Administrators, 1; Injunction, 2.

BILL OF SALE.—*See* Description.

BILLS AND NOTES.

L. employed R. as his correspondent in London, and S. as his correspondent in Havannah. L. drew bills on R., who accepted them against a shipment to S., who sent bills to R. against R.'s acceptances. R. became insolvent and failed to pay his acceptances, and S. also became insolvent. *Held*, that the remittances from S. were specifically appropriated to meet said bills, and that they were not to be applied to the general account between R. and S.—*Ex parte Smart. In re Richardson*, L. R. 8 Ch. 220.

BOND.—*See* Surety.

CARICATURE.—*See* Copyright.

CARRIER.—*See* Bill of Lading; Negligence.

CHAMPERTY.

Declaration that J. H., a brother of the defendant and a cousin of the plaintiff, died leaving a will disposing of his real and personal property. In consideration that the plaintiff would contest the will, and would obtain evidence and advance money for such purpose, the defendant promised the plaintiff to give him half of any personal or real property which the former should obtain by reason of contesting the will. *Held*, that such an agreement was champerty.—*Hutley* v. *Hutley*, L. R. 8 Q. B. 112.

CHARGE.—*See* Priority.

CHARITY.—*See* Perpetuity.

CHOSE IN ACTION.—*See* Husband and Wife.

CHURCH.—*See* Streets.

COLLISION.—*See* Negligence.

CONDITION.—*See* Contract, 2.

CONDITIONAL GIFT.—*See* Perpetuity.

Digest of English Law Reports.

CONTEMPT.

Inferior courts of record have no power at common law to punish for contempt out of court.—*Queen* v. *Lefroy*, L. R. 8 Q. B. 134.

CONTRACT.

1. By agreement between C. and W., C. was to lease certain lots of land for ninety-nine years, at a certain rent to be apportioned as thereafter mentioned. W. was to build on plot P. twenty houses, on plot B. eight, on plot G. ten, and on plot Y. five houses. Separate leases of plot B. and of plot G. were to be made as soon as the houses on these lots respectively were covered in. W. assigned this agreement to the plaintiff, who completed the houses on plots B. and G. and then claimed leases of those plots. *Held*, that as the condition precedent to granting such leases had been performed, leases must be granted to the plaintiff of lots B. and G., although he refused to perform the remainder of the agreement.—*Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

2. The defendants agreed with the plaintiffs to supply 6000 tons of coal to be delivered in equal monthly quantities during the period of twelve months, from the 1st July, 1871. During July the plaintiffs took only 158 tons, and the defendants thereupon declared the contract cancelled and refused to deliver any more coal. *Held*, that the plaintiffs' failure to remove the coal as agreed did not justify the defendants in cancelling the contract.—*Simpson* v. *Crippin*, L. R. 8 Q. B. 14.

3. The contract of a drunken man is voidable, not void. *Matthews* v. *Baxter*, L. R. 8 Ex. 133.

See BANKRUPTCY, 3; COVENANT; DAMAGES, 2-5; INTEREST; LETTER; NEGLIGENCE, 3; PARTNERSHIP; SURETY; VENDOR AND PURCHASER.

CONTRIBUTION.—*See* DEVISE, 1.

CONVERSION.—*See* TROVER.

COPYRIGHT.

The defendant published an account of the life of Napoleon III. containing "the same story as told by popular caricaturists." The book contained, among many others, nine caricatures in a reduced form, taken, without consent, from woodcuts in *Punch*. *Held*, that a substantial part of *Punch* had been appropriated, and that there was an infringement of copyright.—*Bradbury* v. *Hotten*, L. R. 8 Ex. 1.

COSTS.—*See* EJECTMENT.

COURT.—*See* JURISDICTION.

COVENANT.

1. The clerk of a brewery firm covenanted that during his service, or within two years thereafter, he would not sell or recommend on his own account, or for any other person, any Burton ale or ale brewed at Burton, or offered for sale as such, other than the ale brewed by said firm. *Held*, that the covenant was void.—*Allsopp* v. *Wheatcroft*, L. R. 25 Eq. 59.

2. The defendant covenanted not to carry on a public-house within half a mile of the plaintiff's premises. *Held*, that said half-mile must be measured in a straight line, not by the nearest available mode of access between the two houses.—*Mouflet* v. *Cole*, L. R. 8 Ex. (Ex. Ch.) 32 s. c. L. R. 7 Ex. 70; 7 Am. Law Rev. 687.

See CONTRACT, 2.

CY-PRES.

Trustees had power to apply a portion of a fund towards "purchase of or effecting W.'s promotion in the army." Before the trustees had advanced the whole of such portion, purchasing commissions in the army was abolished by law. *Held*, that the remainder of said portion could not be applied for the advancement or benefit of W.—*In re Ward's Trusts*, L. R. 7 Ch. 727.

DAMAGES.

1. Coal was taken by the defendant company from the colliery of another company without fraudulent intent. *Held*, that the defendant was liable for the market value of the coal at the pit's mouth, less the actual disbursements for severing and bringing it to the surface.—*In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46.

2. The plaintiff had a contract for furnishing a certain number of shoes at an exceptionally high price of 4*s.* per pair if delivered February 3. The plaintiff delivered the shoes to a railway Company, with notice that if they were not delivered on said day they would be thrown on the plaintiff's hands. Said company failed to deliver the shoes in time, and they were sold at 2*s.* 9*d.* per pair, the market price. *Held*, that, in absence of notice of said contract price, the plaintiff could not recover as damages the difference between the market price and said contract price.—*Horne* v. *Midland Railway Co.*, L. R. 8. C. P. (Ex. Ch.) 131; s. c. L. R. 7. C. P. 583; 7 Am. Law Rev. 471.

3. Declaration for breach of an agreement whereby, in consideration of L.'s paying £50 for good-will, £100 for painting, &c., and £75 annual rent, W. was to sell the trade fixtures and effects of an inn to L. "And by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of $40 each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages." Demurrer and plea that L. had sued H. for said deposit in his hands "as and for liquidated damages in respect of the said breaches," and had recovered judgment. De-

murrer to plea. *Held*, that said deposit in the hands of H. was liquidated damages, and that L. could recover no further sum; but that the right of L. to sue W. being independent of any right to sue H. the plea was bad. Judgment for plaintiff on demurrer to plea, and for defendant on demurrer to declaration.—*Lea* v. *Whitaker*, L. R. 8 C. P. 70.

4. The defendants agreed by charter-party that their vessel should be at the Tyne and load 1300 tons of coal at a certain time, and broke their contract; and consequently the plaintiff was delayed and had to pay increased freight and a higher price for the coal. *Held*, that, in the absence of evidence that the plaintiff could get back the extra price for the coal on resale, the defendant was liable for such extra price as well as the increase of freight.—*Featherston* v. *Wilkinson*, L. R. 8 Ex. 122.

5. The defendant agreed to sell 3000 tons of coal to the plaintiffs, to be delivered during the months of May, June, July, and August. On May 31, the defendant wrote to the plaintiffs that he considered the contract cancelled, as coal had not been taken according to agreement, and on June 11 refused to deliver any coal. On July 3 the plaintiff brought this action. The price of coal had been and was still rising at the time of action begun. There was no evidence of the difference between the contract price and the price for which the plaintiffs could have obtained a similar contract at the day of the breach. *Held*, that the measure of damages, in the default of such evidence, was the sum of the differences between the contract and the market prices on the last day of each month respectively, although the action was brought before the periods of delivery had elapsed.—*Roper* v. *Johnson*, L. R. 8 C. P. 167.

See Negligence, 3; Penalty; Principal and Agent.

Death.—*See* Negligence.

Dedication.—*See* Way.

Deed.—*See* Mortgage.

Demurrage.—*See* Charter-parter, 1.

Descriptions.

A clerk in the accountants' department of a railway company described himself in a bill of sale as an "accountant." *Held*, an insufficient description.—*Larchin* v. *The North-western Deposit Bank*, L. R. 8 Ex. 80.

Deterioration.—*See* Vendor and Purchaser.

Depositor.—*See* Affidavit.

Devise.

1. A testator gave all his real and personal property to his executors, to be disposed of according to the direction in his will. He directed his executors to pay all his just debts, and then gave his personal estate to his brother, and made specific devises of part of his real estate. The personal estate was insufficient for payment of debts. *Held*, that said specifically devised real estate and the undevised real estate descending to the heir must contribute rateably.—*Stead* v. *Hardaker*, L. R. 15 Eq. 175.

2. The lessee of a piece of land assigned the term to the lessor by way of security for advances, and built four houses on the land. The lessor entered into possession as mortgagee, and died, having devised "my freehold houses" on said land. *Held*, that the mortgage debt did not pass by the devise.—*Bowen* v. *Barlow*, L. R. 8 Ch. 171.

See Payment.

Director.

The director of a company allowed shares to be allotted to his infant children. All the other shares in the company were allotted. The company was wound up, and calls were made upon the shareholders. *Held*, that it was a breach of duty in the director to allot shares to infants; that it was a fair inference that such shares would have been taken by some one other than the infants, as the remaining shares were taken; and that the director was liable, under Companies Act, 1862, § 165, for calls on the infants' shares.—*In re Crenver and Wheal Abraham United Mining Co. Ex parte Wilson*, L. R. 8 Ch. 45.

Distance.—*See* Covenant, 2.

Distress.

Articles of household furniture were deposited at a depository for furniture, to be warehoused at 30*s.* a year. *Held*, that said articles were privileged from distress, having been received in the course of trade, to be dealt with in accordance with such trade.—*Miles* v. *Furber*, L. R. 8 Q. B. 77.

Drunkenness.—*See* Contract, 3.

Easement.

The plaintiff had the right of having rainwater drop from the eaves of his building upon land of the defendant. *Held*, that the easement was not destroyed by raising the height of the eaves from the ground.—*Harvey* v. *Walters*, L. R. 8 C. P. 162.

Ejectment.

Ejectment was brought by T. for a certain estate, the parties defending being the trustees of an infant. T. was non-suited, and became liable for costs. A second action of ejectment was brought by T., in which the defendants were other trustees of other estate belonging to said infant. The question on which each action turned was the identity of T. *Held*, that, as the

plaintiff and the question of title were in each case the same, a stay of proceedings in the second action would be granted, until the costs of the first action were paid.—*Tichborne* v. *Mostyn*, L. R. 8 C. P. 29.

Election.—*See* Insurance, 1.

Entirety of Contract.—*See* Contract, 1.

(To be Continued.)

REVIEWS.

A Treatise on the Law of Injunctions, as administered in the Courts of the United States and England. By James L. High, Counsellor-at-Law. Chicago: Callaghan and Company, 1873.

In this work, the production of a western member of the United States bar, we have another valuable addition to the legal literature of the day, in the production of which American writers are taking an extensive and important part. Of course, so long as resort shall continue to be had to the laws of England in regard to property and civil rights in this Province, and the decisions in the English Courts continue to form the precedents and guides for decisions here, the works of American law writers will not occupy that position in the library shelves of our professional men which their intrinsic value merits. Yet, in many instances, these works supply examples of cases, the circumstances of which could not arise in England, but which may and are likely to arise with us. The circumstances of our country and the condition of our people resemble much more nearly those of the country and people across the border, than those of the mother country. And when, as often happens, questions arise here which have never arisen in England, and in regard to which English text books and reports furnish no information or precedent, we naturally turn to those repositories wherein are stored the results of American experience and American learning, and from them very frequently gain that information which the English law books are unable to supply. Mr. Dillon's very valuable work on Municipal Law, as well as the book now in review, are examples of our meaning.

In the work before us professional men will find, whenever occasion requires, a new and able assistant in the search for American precedents in reference to the law of injunctions. The author does not pretend, as he remarks in the preface, to state the law as it ought to be but as it is, and therefore "he has studiously refrained from the obtrusion of his own theories * * because in these days of multiplied book-making, the tendency among lawyers is to use text books merely as guide posts to direct them to the fountain head of our jurisprudence, namely the reports." Considering how difficult it usually is for men to refrain from the obtrusion of their own theories, whether good or bad, it is all the more creditable to our author to find that throughout he has adhered to his determination and modestly kept himself in the background. If judges and law administrators always exercised somewhat of the same self-control, and refrained occasionally from the "obtrusion of their own theories,"—remembering that it is their province to administer the law as it is and not as it ought to be—how much more steady and even would be the course of justice!

Mr. High does not, however, confine himself to the American authorities. In fact, the main merit which he claims for his production is that it supplies a work based upon the decisions of both England and America, and presenting the general principles governing courts of equity, both in England and America, in the administration of preventive relief. The reader will, therefore, find throughout the work a reference to English authority, though not so full and complete as that contained in the English treatises of Mr. Kerr and Mr. Joyce. But the work is rich in reference to American cases on injunctions, in the search for which the author has evidently exercised much patience and industry. The arrangement of the subjects seems judiciously made, and a copious table of cases cited, and a full index, complete a work which we trust will bring its author both profit and honor.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law. (The names are given as on the roll, and not in order of merit.)

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.

No. 1268. James Stafford Kirkpatrice.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrice.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatcherd.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR NOVEMBER.

1. Sat. .. *All Saints.* Candidates for Attorney to leave Articles, &c., with Secretary of Law Society.
2. SUN.. *21st Sunday after Trinity.*
4. Tues.. Primary examination of Students and Articled Clerks.
5. Wed... Battle of Inkerman, 1854.
9. SUN.. *22nd Sunday after Trinity.* H.R.H. Prince of Wales born, 1841.
11. Tues.. Battle of Chrysler's Farm, 1813.
13. Thurs. Last day for service for Co. Cts. Exam. Law Stu. for call with Honors. Cand. for call to pay fees and leave papers.
14. Fri. .. Examination of Law Stu. for call to the Bar.
15. Sat. .. Exam. of Art. Clks for admission as Attorneys.
16. SUN.. *23rd Sunday after Trinity.*
17. Mon.. Mich. Term begins. Art. Clks. and Stu. give notice for inter-examination.
18. Tues.. Certificates to be taken out during this Term.
20. Thurs. Inter-examination of Stu. and Art. Clks.
21. Fri. .. Paper Day, Q.B. New Trial Day, C.P.
22. Sat. .. New Trial Day, Q.B. Paper Day, C.P.
23. SUN.. *24th Sunday after Trinity.*
24. Mon.. Last day to declare for Co. Ct. Paper Day, Q.B. New Trial Day, C.P.
25. Tues.. Examination for Scholarships. New Trial Day, Q.B. Paper Day, C.P.
26. Wed.. Last day for setting down and giving notice of re-hearing in Chancery. Paper Day, Q.B. New Trial Day, C.P.
27. Thurs. Open Day, Q.B. Paper Day, C.P.
28. Fri. .. Scholarship Exam. con. New Trial Day, Q.B. Open Day, C.P.
29. Sat. .. Open Day, Q.B. Open Day, C.P.
30. SUN.. *1st Sunday in Advent. St. Andrew.*

CONTENTS.

EDITORIALS:
- Law School Lectures 305
- Mr. Walkem's Treatise on the Law of Wills 305
- Costs in Cases of Appeal 306

SELECTIONS:
- License in Cross Examinations 307
- Lord Kenyon 308

CANADA REPORTS:

ONTARIO:

NOTES OF RECENT DECISIONS:
- Queen's Bench, H. T., 1873..... 308
- Common Pleas, E. T., 1873..... 311
- Common Law Chambers— *(Reported by Mr. C. C. Robinson, Student-at-Law)* 312
- Chancery Chambers— *(Reported by T. Langton, Esq., Barrister-at-Law)* 312

NOVA SCOTIA:
- In re Pyke, an Insolvent— *Insolvent Act, 1869, sec. 50—Delivering goods to real owner—Entitling affidavit* 314

ENGLISH REPORTS:

COURT OF COMMON PLEAS:
- Gourley v. Plimsoll— *Libel—General plea of justification—Criminal charges* 315

COURT OF PROBATE:
- Boughton v. Knight— *Will—Testamentary capacity* 319

DIGEST OF ENGLISH LAW REPORTS..... 325

REVIEWS:
- Clarke on Insurance 330
- American Law Review 331

CORRESPONDENCE:
- Law Society—Primary Examinations 331

LAW SOCIETY OF UPPER CANADA..... 332

THE

Canada Law Journal.

Toronto, October, 1873.

The Law School Lectures commence on the first of this month. The subjects to be discussed are stated in our advertising columns. We have no doubt that the privileges extended to students in these days will be largely made use of.

The advance sheets of Mr. Walkem's Treatise on the Law of Wills have been courteously sent to us by the publishers. It is not our intention, nor have we either time or space at present, to review the book, but we hasten to call the attention of the profession to it. The subject treated is a very difficult one; but we have reason to think that Mr. Walkem has mastered it, and a hasty glance would seem to show that he has done a good work for the profession. Defects there may be, and probably are; but no matter how this may be, we can nevertheless see that a most important branch of the law, differing, as it does, materially from the law in England, and recently subjected to great legislative changes in this country, has been discussed with great intelligence and industry, by the light, as well of English as of Canadian authorities. Should we be right in our supposition as to the value of Mr. Walkem's addition to Canadian legal literature, we may look forward to its being added to the Law Society curriculum. Every encouragement should be given to native talent; and, other things being equal, law books which state the law as it exists here, are preferable, as school text books, to those which are written with especial reference to the law as it stands in another country.

COSTS IN CASES OF APPEAL.

The two highest English tribunals to which colonial courts are wont to look for guidance are at variance on the important question as to the principle to be adopted in awarding costs of appeal to a successful appellant. The difference was tersely pointed out by Lord Cairns in *De Vitre* v. *Betts*, 21 W. R. 705, as follows: "The rule is, in this House (the House of Lords), that where an appellant, in succeeding, corrects a miscarriage of the court below, he is not entitled to the costs of the appeal, because the respondent in such a case is merely seeking to retain the advantage which he has obtained. The rule of the Judicial Committee of the Privy Council is, generally speaking, to give the successful party the costs of the appeal; and I own I consider the rule of the Privy Council on the whole the better rule of the two." The Court of Error and Appeal for this Province has always followed the practice of the House of Lords; and when some members of the court in the Goodhue case were, perhaps inadvertently, about to give their decision that the appeal should be allowed *with costs*—yet, on the remonstrances of counsel for the respondents against the innovation, the court gave effect to the general rule of practice, and simply allowed the appeal.

As to appeals from County Courts to the Superior Courts of Common Law, the practice now prevails here, as in England, of allowing such appeals with costs. We commented upon the change of practice in this respect in 8 C.L.J. N.S. 133.

Appeals to the Court of Chancery from inferior courts are but few and far between. For the most part they arise under the Insolvent Act, and we think the practice may now be considered as well-settled that the costs in such cases will usually follow the result. A distinction is to be observed between the Act of 1864 and that of 1869, now in force, as to the provisions respecting the costs of appeals. Sub-sec. 6 of sec. 7, of the former Act, provided that the costs in appeal were to be in the discretion of the court appealed to. In the latter Act this provision is altogether omitted, and no reference is made as to awarding costs in appeal, except in cases where the appeal is not duly prosecuted. Under the former Act, the usual course was to allow or dismiss the appeal with costs, and the same rule has been generally observed under the present Act. See *Re Williams*, 31 U. C. Q. B. 153. We understand that the right or jurisdiction of the appellate court to award costs in insolvency appeals was argued before Vice-Chancellor Strong in an unreported case, *Re Patterson* (January, 1873). The learned judge held that the court had power to deal with the question of costs upon allowing an appeal, and that, in his view, the practice of the Privy Council was preferable to that of the House of Lords, and in a colonial court was to be followed under analogous circumstances, as being the practice of the court of last resort for colonial appeals. Acting upon this opinion, he allowed the appeal, and awarded against the respondents all costs, both in the court below and in the Court of Chancery on the appeal. The Vice-Chancellor appears to be in accord with the views of Lord Cairns, subsequently expressed, as to the rule of the Privy Council being more satisfactory than that of the Lords; and from late decisions we observe that Malins, V. C., appears to be of the same opinion. In *Ashley* v. *Sedgwick*, 21 W. R. 455, he held that in appeals from a County Court where the subject-matter in dispute is small, the court will, in its discretion, give a successful appellant his costs, both in the court below and of the appeal. And so he also decided in *Booth* v. *Turle*, 21 W. R. 721.

In respect to re-hearings in Chancery, the practice in this Province appears to be somewhat changing in allowing the party who successfully re-hears to obtain all his costs. This seems in part to be due to the influence of the judge last appointed to the equity bench, Vice-Chancellor Blake, who has frequently taken occasion to express his views that in all cases costs should follow the result, and that an error of the judge of first instance should not protect the party who profits by it from paying all the costs in the long run, if the full court reverses the judgment below. The last reported decision in re-hearing, *Dalglish* v. *McCarthy*, 19 Grant, 578, exemplifies these remarks. There the court allowed the appeal with costs, Blake, V. C., citing the language of the late Lord Westbury in *Bartlett* v. *Wood*, 9 W. R. 817, where he says, "I have had occasion to observe upon the general rule, and it is one from which, most undoubtedly, so far as I am concerned, I shall seldom depart; namely, that in contentious cases, the costs of the litigation must be considered as following the result of it."

It may be well to note that the same volume of reports contains an able decision of the Chancellor in *O'Donell* v. *Black*, 19 Gr. 623, where the general question as to the principle on which costs should be awarded to successful litigants is discussed.

Upon the whole, the courts of Ontario may be said to have come to the conclusion that all appellants who succeed in their appeals should, as a consequence, obtain complete success, by having awarded to them their costs of appeal, except in the highest court of the Province, where the rule of the House of Lords is yet followed. It is desirable, in our judgment, that the practice of the Court of Error and Appeal should be reconsidered, or that a general order should be passed touching the costs of appeal which would render the disposition of these costs uniform in all the courts.

SELECTIONS.

LICENSE IN CROSS EXAMINATIONS.

Some instances of cross-examination to credit have recently occurred which must have suggested very generally that the prevailing license is apt to be grossly abused. The *Pall Mall Gazette*, whose representative in legal matters is Mr. Fitzjames Stephen, has handled the subject scientifically, and, we need hardly add, adduced an illustration connected with the Indian Evidence Act. The writer is afraid to mention the cases upon which his article is based, but he evidently refers to the cross-examination of Lord Bellew, who, having given evidence as to the tatoo marks in a celebrated pending trial, was asked in cross-examination whether he had ever acted dishonourably concerning another man's wife and cruelly to his own. In another case the victim of a seduction was asked a series of most offensive questions in cross-examination with a view to show that she had previously been unchaste. No evidence was called to support this cross-examination, and Mr. Justice Honyman condemned it in unmeasured terms. For the benefit and instruction of attorneys and counsel let us hear what a high-class thinker, and a man of unblemished character, says on the subject:—"The client," says the writer above named, "tells his attorney some lie about a witness against whom he has a spite. The attorney passes it on to the counsel, *and unless the counsel is a man both of experience and principle*, he is but too apt to regard this, however wrongly, as an instruction which relieves him from all responsibility in the matter, and compels him to throw in the face of the witness an insult which may not only deeply wound his or her feelings, but permanently injure his or her reputation. We do not at all forget, nor are we disposed in any degree to underrate, the good feeling and principle of legal practitioners, or the influence of the Bench in checking abuses of their legal powers. *No lawyer in either branch of the profes-*

sion who had either the feelings of a gentleman or any sort of position or reputation to lose, would degrade himself by slandering or insulting those who must from the nature of the case submit to his insult or his slander without defence or reply. When such conduct does take place it is sure to provoke indignant rebukes from the Bench, and it is to these circumstances that we owe it that English courts of justice are not, in fact, regarded with the horror with which they assuredly would be regarded if the parties used to their utmost their legal right of raking up every incident in the past life of every witness and every lying scandal which has ever been circulated by any enemy with respect to them, and flinging the whole in their faces in the confidence that imputations which may happen to be true will inflict moral injury on the reputation of the witness, and that even if the imputation is utterly false some of the dirt can hardly fail to stick." We hope the passages which we have italicised will be duly conned and remembered. It is suggested that an absolute discretion should be given to a court to permit or forbid the putting of any particular question. We agree that in any case the permission of the Judge should be obtained before cross-examination to the credit of a witness is allowed at all. If a question is put and not allowed to be pressed the object of the cross-examination is in a measure attained. It ought, in all cases, to be a question for the Judge whether the evidence of a witness is of such a kind that his credibility ought to be attacked. A further suggestion made by the writer in our contemporary is that a witness should not be allowed to decline to answer on the ground that he will thereby criminate himself. This is a wide proposition which we shall not at present discuss.—*Law Times.*

The following incident in the life of Lord Kenyon is recorded in an account of his life recently published by a descendant of his. It is taken from a letter of Lord Erskine to Lord Howell, in 1821, relating to a judgment in the court of admiralty in a case of collision at sea:—

"I remember my excellent friend, the late Lord Kenyon, one of the best and ablest judges, and the soundest lawyer, in trying a cause at Guildhall, seemed disposed to leave it to the jury whether the party who suffered might not have saved himself by going on the wrong side of the road, when the witnesses swore that ample room was left. The answer to which is, the dangerous uncertainty of such an attempt, destructive of all the presumptions of conduct founded upon law. Observing that Lord Kenyon was entangled with this distinction, from his observations in the course of the evidence, I said to the jury, in stating *(sic)* the defendant's case:— 'Gentlemen,—If the noble and learned judge, in giving you hereafter his advice, shall depart from the only principle of safety (unless where collisions are selfish and malicious), and you shall act upon it, I can only say that I shall feel the same confidence in his lordship's general learning and justice, and shall continue to delight, as I always do, in attending his administration of justice; *but I pray God that I may never meet him on the road!*' Lord Kenyon laughed, and the jury along with him, and when he came to sum up he abandoned the distinction, saying to the jury that he believed it to be the best course *stare super antiquas vias.*"

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

QUEEN'S BENCH.

Hilary Term, 1873.

DAVIS ET AL. v. MCPHERSON.

Patents, construction of—Description of land—"N. W. ¼."

In 1857 a patent issued for the "North-Westerly quarter" of a two hundred-acre lot, the side-lines of which ran N. 45° W., and S. 45° E., and in 1859 another patent issued for the S. E. ¼ of the N. W. ¼ of the same lot. *Held*, that the first patent covered fifty acres, extending half the depth and half the width of the lot, and not fifty acres extending across the whole width and one fourth the depth. *Held*, also, the subsequent patent could not affect the first; for the question must be, what did the patent cover when issued? *Held*, also, that the

assignment to the respective patentees by the original purchaser of the N. W. ¼ could not be resorted to to aid the interpretation of the patents.

Roche et al. v. Kempt.

Promissory note—Accommodation maker—Principal and surety—Opening up account stated.

Action upon a promissory note made by defendant, payable to M., and endorsed by M. to plaintiffs. Plea: that the note was made for the accommodation of M., and, before action, was paid by M. to plaintiffs. At the trial it appeared that the defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between plaintiffs and M., to which defendant was not a party, by which, if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and in the event of a loss it was to be borne *pro rata* by the several indorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M., in his evidence, stated that he had not got credit for some timber of his taken by the plaintiffs. Defendant offered evidence to show that under the accounts between M. and plaintiffs, there was a balance due to M., which, under the agreement referred to, would show this note to be paid by M.

Per Morrison, J.—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially.

Per Wilson, J.—The evidence was admissible, and it was competent to defendant to open up the account between M. and plaintiffs.

Bateman v. City of Hamilton.

City corporation—Negligent construction and obstruction of culvert—Action for.

In an action for negligently constructing a culvert under a public street, and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, &c., it appeared that the culvert, &c., had existed for twenty years, under a public street in the city, but it was not shown by or for whom it was made, nor when the obstruction of the culvert by mud and stones, &c., took place, nor that it had been brought to defendants' knowledge.

Held, that the plaintiff must fail.

Groves (Assignee in insolvency of Owen McMahon) v. McArdle.

Insolvent act of 1869—Estoppel—Finality of proceedings in insolvency.

Declaration by plaintiff as assignee in insolvency of McM., on the common counts.

Plea: that McM. was not a trader within the meaning of the Insolvent Act of 1869.

Replication by way of estoppel, setting out in full the proceedings and adjudication in the insolvent court, showing that an attachment in insolvency issued against McM., that he petitioned the judge to set it aside, on the ground, among others, that he was not a trader within the act, that the judge decided that he was a trader, and that such decision was affirmed on appeal by one of the judges of the C. P.

Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.

Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events, as against a debtor of McM., but were subject to question in this court.

Halpenny v. Pennock.

Husband and wife—Purchase of goods, and chattel mortgage by wife—Agency implied—Leave and license—Evidence.

The plaintiff went to British Columbia nine years before this action, leaving his wife here, to whom he wrote and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house (which she subsequently carried on with the plaintiff's knowledge), and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and the defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance, after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover.

Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture, and to do all that was necessary to acquire it.

Held, also, assuming that she exceeded her authority in giving a mortgage under seal, yet, as the mortgage would be valid without a seal in her own name, the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of.

Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement.

Semble, that the wife standing by and permitting the sale of the property under the mortgage was some evidence under the plea of leave and license.

Per WILSON, J.—Under C. S. U. C. ch. 73, the wife had power to buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right she could give a mortgage by deed in her own name as if a *femme sole*.

RE WESCOTT ET AL. AND THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Mandamus to build bridge—Public Works Act, Con. Stat. C. ch. 28, sec. 10, schedule "A"—Authority of Company to build.

In 1856 a road company obtained leave to build a bridge at a point on the O. river, from the Public Works Department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and if the Government required a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the Department, and was removed by the County, under whose control the road had passed. Upon application for a mandamus to the Corporation of the County to build a swing or other bridge at the point. *Held*, that it was discretionary in the Government to allow a bridge there or not, and that the County were neither authorised nor compelled to build it. The application was therefore refused.

TAYLOR v. CAMPBELL, Postmaster-General.

Contracts for parliamentary and departmental printing—Construction of.

On the 2nd of July, 1869, plaintiff contracted with one H. as clerk of the Joint Committee of both Houses of Parliament, to do the printing, &c., for both Houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, as specified in requisitions to be made upon him by the departments respectively, including the Postmaster-General's, at scheduled prices; which were lower than those under the first contract, and so tendered for as alleged by plaintiff, because he expected in cases where similar matter was required under both contracts to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of, and paid by such departments, and the copies required for Parliament were ordered and paid for separately through the clerk of the Joint Committee on Printing; and afterwards by resolution of the Committee, concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments with which the departments should be charged.

The reports of the Postmaster-General having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department. *Held*, that he had no such right.

Quære, whether such an action would lie against the Postmaster-General, and as to the propriety of asking the Court to pronounce an opinion.

ALLEN ET AL v. CHISHOLM.

Carriage by water—Agreement to pay shortage—Right to set it off against freight.

The plaintiffs agreed with defendants to carry 11662 30-60 bushels of wheat from Toronto to Kingston, at 3¾ cents per bushel. The bill of lading being signed for the whole amount, and stipulating that "the vessel was to deliver the quantity expressed or pay shortage." On the delivery to the consignees 181 bushels short, they, representing defendants, whose interest in the wheat continued, refused to pay freight.

Held, that defendants were liable for the freight, and had no right to deduct their claim for shortage; such claim not being a liquidated demand so as to form the subject of set off against the freight.

33 Vict. ch. 19, sec. 30, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or endorsers for value.

COMMON PLEAS.

HILARY TERM, 1873.

ROAF v. GARDEN ET AL.

Landlord and tenant—Acceptance of rent—Amount awarded for buildings—Receipt of after time.

Where in a lease for 21 years, ending on the 1st September 1872, it was covenanted that on the expiration thereof, the lessor, one R., should at his option either pay within 30 days, the value of the buildings, or renew for a further term of 21 years; such value and the rent to be determined by arbitration. On the expiration of the lease, an agreement of reference was entered into, between C., the lessee, one B. to whom C. had mortgaged his interest, and R., the award to be made by the 30th September, but it was agreed that should this award not be made by that time, and R. should select to pay for the buildings, he should pay the sum awarded within a week after the award, and the extension of time should be taken as a covenant in the lease. The parties enlarged the time for making the award until the 1st November, and on the 26th October, the umpire made his award. R. selected to pay for the buildings, but the amount awarded was not paid to the mortgagee, the person entitled to receive it, until the 5th November, more than a week after the award was made. Defendants were tenants under C., their terms were unexpired when this action was brought, and they had paid their rents to C. for the quarter ending the 1st October. On the 18th September, R. leased the premises to the plaintiff, and after R. had paid for the buildings, the plaintiff demanded possession from the defendants, which they refused to give, and informed plaintiff of their having paid their quarter's rent to C. The plaintiff then called on C., who paid to him the proportion of the rent which he had received, for the period between the expiration of C.'s lease, and the 1st October.

Held, that the receipt of the rent by plaintiff from C. was no evidence of a recognition of an existing tenancy between plaintiff and defendants, for there was no direct dealing with the tenants themselves, and the fact of plaintiff demanding possession, and only being paid a fractional part of the quarter's rent paid by the tenants to C., repelled the idea of any intention to recognise defendants as his tenants.

Held also, that the fact of R. not having paid the amount awarded for the buildings within the week, did not deprive him of his right of election, and so enable C. to hold for a further term of 21 years, for R. being the proper person to receive the amount, might extend the time.

The plaintiff was therefore held entitled to maintain ejectment against defendants.

FERGUSON v. THE CORPORATION OF THE TOWN OF GALT.

Railway Contract—Certificate of Engineer—Condition precedent—Waiver—Pleading.

Declaration on the Common Counts.

Fifth plea referred to a sealed contract set out in the 4th plea, made between the plaintiff and the defendant, whereby the plaintiff for a lump sum of $22,123, agreed to build a railway from Galt to Doon, which was to cover all extras of every kind, except as specified; and then averred that it was further agreed by said contract that approximate estimates should be made every month, until the work was completed, of the work done the preceding month, and certified by defendants' Engineer: that 75 per cent. of such estimate should be paid to plaintiff on or before the 15th of each month, until the completion of the whole work to the satisfaction of said Engineer; that all percentages retained by defendants during the progress of the work, should be paid to the plaintiff, upon the certificate in writing of the completion of the work, being granted by the Engineer; that the plaintiff's alleged cause of action *was for the work alleged to have been done by him in performance of his said contract, in respect of the work embraced therein;* that one D. C. O. was defendants' Engineer in charge; that defendants have paid the plaintiff 75 per cent. of the approximate estimates; and that no certificate of the completion of the work had been procured or applied for by plaintiff, or granted by the Engineer, &c.; and so said percentages are not payable to plaintiff, except as to the same sum.

Sixth plea: that by the contract it was provided that all disputes, either as to quantities of work to be done over and above that of the contract, and defined in specifications, or as to the quantity of work done by the plaintiff; and the amount of the same demanded by the contract, should be determined solely by the engineer, whose decision on all questions pertaining to the contract should be final; and the defendants say *that the plaintiff's alleged cause of action was for work alleged to have been done by him under said contract;* that D. C. O. was the engineer in charge, and that he was not determined or decided that the plaintiff had performed any work over and above that of the contract, or that the plaintiff is entitled to recover from the defendants any sum whatever.

Replication to the fifth plea: that before jac-

tion defendants accepted and received from the plaintiff all the work mentioned and referred to in the fifth plea, and waived any rights they had to the production or procurement by plaintiff from the engineer of the certificates of completion, and defendants so relieved the plaintiff from any obligation to procure such certificate.

Held, on demurrer: pleas good, for it being admitted by the demurrer that the cause of action was for work done under the sealed contract, the plaintiff could not recover without the stipulated certificate or the decision of the engineer. 2. Replication bad.

Easter Term, 1873.

Buchanan v. Young et al.

Clearing land—Damage by fire—Liability.

Persons have a right to set out fire on their land for the purpose of clearing it, and if the flames spread under the influence of a wind suddenly arising, and cause damage to a neighbor, no action will lie without proof of negligence.

It was held misdirection in such a case to tell the jury that defendants were bound to have anticipated the rising of the wind, and to use extraordinary caution.

Turner et al v. Wilson.

Action on forged guarantee—Estoppel.

In an action on a guarantee to secure payment for goods furnished by plaintiffs to one W., alleged to have been made by defendant and one G., but afterwards proved to be a forgery, it appeared that the plaintiff had had no communication whatever with defendant during the currency of the account sued for; but that W. afterwards becoming insolvent, one F. was sent to Kincardine, where W. lived, to represent certain creditors, amongst whom were the plaintiff, and at a meeting at which defendant was present, F. asked W. what claims were guaranteed and by whom, to which W. answered that the plaintiffs' note, with certain others, was endorsed by defendant and G., and although defendant heard this, he said nothing. F., however, did not then appear to have been aware of the guarantee. After this, W. absconded, and some time afterwards, defendant and G. went to plaintiffs' office and tried to make a settlement for a less amount of W.'s liability. This the plaintiffs refused to do, alleging that they were fully secured, and produced the guarantee. G. at once said that he did not believe it to be his signature; but defendant said nothing.

Held, that defendant was not estopped by his conduct from denying his liability.

COMMON LAW CHAMBERS.

Smith v. Thompson.

Practice in pleading—Date of declaration.

[August 28, 1873—Mr. Dalton.]

Held that the use of the abbreviation "A. D.," instead of the words "in the year of our Lord," in the dating of a declaration, is not sufficient ground for setting it aside.

Woodward v. Cummings.

Ejectment—Married Woman—Practice.

[August 28, 1873—Mr. Dalton.]

Held, when a wife, living apart from her husband, is in possession of land under such circumstances as precludes the presumption of her being agent for her husband, she must be made a defendant in ejectment for the land.

McIntyre v. Fair.

Commission to examine witnesses in Quebec.

[August 31, 1873—Mr. Dalton.]

Con. Stat. Can. cap. 79, sec. 4, *et seq.*, which authorizes the issue of subpœnas to the Province of Quebec, does not take away the power of the Court to examine witnesses there by commission. (See *Stratford* v. *G. W. R.* below.)

CHANCERY CHAMBERS.

O'Donohue v. Hembroff.

Reference back to a Master—Jurisdiction of Referee.

[May 21, 1873—The Referee.]

A motion to refer a cause back to a Master for the reception of further evidence, after he has made a report which is confirmed, should be made in Court.

Stratford v. Great Western Railway Co.

Commission to Quebec—Con. Stat. Can., c. 79, § 4.

[March 31st, 1873—The Referee.]

Con. Stat. Can. c. 79, sec. 4, which authorizes the issue of a subpœna to the Province of Quebec, merely gives a plaintiff an additional mode of procuring his evidence, and does not deprive him of the right to have the examination by a Commission. (See *McIntyre* v. *Fair* above.)

Cotton v. VanSittart.

Reference back to a Master—Mistake.

[June 6, 1873—The Referee.]

A creditor who, through a mistake, had not come into the Master's office to prove his claim,

was allowed to do so upon payment of costs of and subsequent to the report, including costs of application—the Master's report not having been confirmed.

STRATFORD v. GREAT WESTERN RAILWAY CO.

Production.

[June 7, 1873—The Referee.]

The proper mode of contradicting an affidavit on production is by cross-examination of the deponent, and not by counter-affidavit.

Re MULLARKY, McANDREW v. LAFLAMME.

Application for leave to rehear—Delay.

[June 23, 1873—Blake, V.C.]

The rule that no re-hearing will be permitted after the time limited, unless the delay is excused, is to be strictly followed. The fact that negotiations for a settlement were pending during all the time since decree was considered no sufficient excuse for the loss of three re-hearing terms.

RE FOSTER.

Affidavits in reply—Cross-examination on.

[June 23, 1873—Blake, V.C.]

In the absence of authority to the contrary, it was held that cross-examinations upon affidavits in reply should be allowed, as in the case of other affidavits, more especially as affidavits in reply could not otherwise be answered.

HARDING v. HARDING.

Supplemental answer.

[June 26, 1873—The Referee.]

Applications for leave to file a supplemental answer should be made in Chambers before the Referee. (*Churton* v. *Frewson*, 13 L. T. N. S. 491 not followed.)

Upon a similar application in *Watkins* v. *Western Assurance Co.*, on 27th Sept., 1873, an order was granted in Chambers.

Parent v. *Murphy* (Strong, V.C., April 25, 1873) followed.

DUNN v. McLEAN.

Amending—Adding and striking out parties under the common order.

[June 27, 1873—The Referee.]

Held that a party plaintiff may be added under a *præcipe* order to amend. Neither a party plaintiff nor a party defendant can be struck out under an order to amend obtained *ex parte*.

Hitchens v. *Congreve*, 1 Sim. 500 followed.

BROWN v. DOLLARD.

Reference to a Master—Jurisdiction of the Referee.

[August 25, 1873—Chancellor on appeal from Referee.]

One Horkins filed a bill for redemption, which was dismissed with costs. This amounted to a foreclosure (see *Bishop of Winchester* v. *Payne*, 11 Ves. 109). Horkins remained in possession and some time afterwards a suit was instituted to wind up a partnership, in which suit, on a motion for an order requiring Horkins to attorn to the receiver, it was referred to the Master to ascertain whether he held as tenant or was in possession as mortgagor and still entitled to redeem. The Master found that he was entitled to redeem and appointed a day for that purpose.

A motion was then made before the Referee to set aside this order on the ground, amongst others, that no notice of the application on which the order was made, or of the enquiry had thereunder, had been given to the administratrix of the mortgagee, who might have cause to show against redemption. The Referee made an order referring the matter again to the Master. On appeal this order was set aside, for the reason that it was not within the jurisdiction of the Referee to order a reference to a Master to ascertain such a question, and the original order was also rescinded for the same reason.

BAIN v. McCONNELL.

Dismissal for want of prosecution—Excuse for delay.

[September 4, 1873—The Referee.]

The pendency of another suit, which would give the relief desired, but in which no decree has been obtained, is not a sufficient answer to a motion to dismiss for want of prosecution.

RE NOLAN.

Married woman—Order allowing to execute a deed without her husband's joining—Statutes, 36 Vict. c. 18, § 4—Jurisdiction of the Referee.

[Sept. 11 and 15, 1873—Referee and Chancellor.]

Applications under 36 Vict. c. 18, sec. 4, O., for an order allowing a married woman to execute a deed without her husband's being also a party, should be made to a Judge in Chambers, and not to the Referee.

McGILLIVRAY v. McCONKEY.

Dismissal for want of prosecution—Costs.

[September 4, 1873—The Referee.]

Upon a motion to dismiss where the only complaint is that the replication has not been

filed within the time limited for so doing, and no sitting of the Court has been lost, the plaintiff may be put on terms to go down to the next hearing at the place where the venue is laid, but the defendant will not be awarded costs of the application unless he has, by letter or otherwise, required the plaintiff's solicitor to proceed and file replication and the latter has neglected to do so.

NOVA SCOTIA.

In re Pyke, an Insolvent.

Insolvent Act, 1869, sec. 50—Delivering goods to real owner—Entitling affidavit.

Held.—1. That an application to deliver goods seized on attachment against an insolvent to the real owner, under sec. 50 of the Act of 1869 may properly be made whilst the goods are still in the hands of the guardian and before given up to the Assignee.

2. That the petition and affidavits need not be headed in any cause.

[Halifax, August-December, 1872.]

This was an application made to the Court under section 50 of the Insolvent Act of 1869, on the summary petition of Henry Lawson to obtain the possession of certain goods conveyed to him by a bill of sale from the insolvent, bearing date the 8th day of July, 1872, which was recorded on the 13th day of the same month.

Ritchie, for Lawson, presented and supported the petition.

Bligh appeared for the creditors and opposed the application.

The application cannot be legally granted:—

1. Because the petition and the affidavit are not headed in any cause.

2. The application is made too soon, as under section 50 of the Insolvent Act of 1869 the property must be in the possession of the Assignee, and the order to restore must be made upon the Assignee and not upon the Guardian, who is at present in possession of the goods.

Mr. Sutherland (Judge in Probate and Insolvency.) As to the first point I do not think in an application such as the present it is necessary that either the petition or affidavit to verify it should be headed in the cause. It does not, in any manner, influence the cause, though it has an influence on the general funds of the estate. Indeed the cause itself or the attachment is only the medium by which the estate of the Insolvent is brought into bankruptcy, and after the property attached passes into the hands of the Guardian, unless a motion be made to set aside the proceedings, the attachment has, as I conceive, accomplished its object and is at an end. The petition and affidavit are, in my apprehension, sufficiently and properly headed.

Upon the second objection I am of opinion that the application is made in proper time, and that the spirit of the 50th section of the Act applies to guardians who hold the property as well as to assignees. The object of the section is by a summary mode to restore property to the legal and proper owner which is improperly held by the officer appointed under the Act as belonging to an insolvent.

The Guardian holds the property in the same manner as an interim or official Assignee until an Assignee to the estate be appointed by the creditors, and there can be no reason why the same remedy under the 50th section of the Act should not be extended to owners when the property is in the hands of a Guardian as when in the hands of an Assignee. I have no difficulty in deciding that the order to restore property may be made to the Guardian.

As to the last objection urged it was also contended that the property being in the possession of the Insolvent at the time of the attachment as the reputed owner, it belonged to the estate of Pyke, and could not be restored to Lawson the real owner.

The cases quoted in support of this contention were decided upon the 125th section of the 106th chapter of 12 & 13 Vict., the English Bankruptcy Act, which says: If any Bankrupt, at the time he becomes so, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. There is no such provision, however, in our law, and the cases do not apply.

The present application must, I think, be decided under section 87 of the Insolvent Act of 1869.

I therefore order that the goods contained in the Bill of Sale be delivered up to Lawson, the applicant, within 14 days; or if the Guardian, Assignee or creditors of the Insolvent shall deem it for the benefit of the estate to retain and sell the said goods and chattels, then Lawson shall be paid out of the estate the sum of

eight hundred dollars, money advanced by him under the said Bill of Sale upon the said goods.

From this judgment the creditors appealed to the Supreme Court, where it was confirmed, Mr. Justice Ritchie and Mr. Justice McCully coinciding on all points with the views expressed by the Judge below.*

ENGLISH REPORTS.

COURT OF COMMON PLEAS.

GOURLEY v. PLIMSOLL.

Libel — General plea of justification — Criminal charges.

As a general rule, in actions for defamation the ordinary plea that the matters complained of by the declaration are true in substance and in fact, is sufficient, and will be allowed.

Therefore, where the plaintiff charged as a libel and set out in his long declaration passages from a book written by the defendant, imputing to the former that he, being a shipowner, sent vessels to sea overloaded and unseaworthy, and over insured, with a wilful and reckless disregard of the lives on board, and with the object of losing the ships, and a general plea of justification was pleaded, the court allowed the plea, on the ground that particulars thereof might be obtained, and that such a plea with particulars is in practice preferable to a special plea.

[28 L. T. N. S. 593—April 25, 1878.]

Motion for a rule calling upon the defendant to show cause why an order of Cleasby, B., should not be varied in so far as it permitted the defendant to plead two pleas to the following declaration: For that before, etc., the plaintiff was member of Parliament for the borough of Sunderland, in the county of Durham, and was also engaged very extensively in the business of a ship-owner and merchant, and as such was possessed of many ships which traded between the ports of the United Kingdom and also between those ports and divers ports and places in foreign countries, and as well in the coal trade as in other and general merchant trades and mercantile marine business, and the defendant was Member of Parliament for the borough of Derby, in the county of Derby; and thereupon the defendant falsely and maliciously printed and published and caused and procured to be printed, published, and circulated of and concerning the plaintiff, and of and concerning him in relation to his aforesaid business, in a certain printed book, entitled, "Our Seamen: an Appeal; by Samuel Plimsoll, M.P.," the false, scandalous, malicious, and defamatory words and matters following, that is to say:—

[The alleged defamatory matter was then set out, and the innuendoes followed thus:—]

The defendant thereby meaning that the plaintiff, as a shipowner, needed the restraint and prohibition of the law, and without being made subject to the penalties of the law would have no hesitation in exposing others to the risk of losing their lives if, by so doing, he would augment his own profits, and that the plaintiff was a greedy and unscrupulous man, and would not scruple to ship too large a load in a vessel for the same to carry with safety to the ship and crew, if thereby he could enhance his own profits, and habitually and wantonly ran the risk of causing the loss of his said ships and the deaths of the crews of the same, for the purpose that in so doing he could augment his profits on such ships, and that the plaintiff was one of the shipowners who, by such overloading, wantonly and needlessly imperilled ships and men's lives, and caused nearly all the losses of ships and lives on the English coast, and that by over-insurance the plaintiff habitually made himself secure from loss in such a course of conduct. And further, that the plaintiff, by such practices, had acquired an evil reputation in his said business, and was generally known as one who habitually overloaded his ships, and that he was also of evil reputation for terribly frequent and disastrous losses of ships and lives occasioned by his aforesaid practices or his cynical disregard of human life in order to increase his pecuniary gains, and that by reason of the premises the plaintiff's name in the said business had become so black with infamy that the insurance brokers in London dared not offer risks for insurance unless they warranted that the cargoes were not to be carried in (amongst others) the plaintiff's ships, and that plaintiff, though he held his head very high, was in the trade, and among those who knew his business affairs and reputation, and his aforesaid practices, of evil character and repute, and was in truth guilty of practices which justly rendered him infamous. Whereby the plaintiff was greatly injured in his name, character and reputation, and in his said business, and was held up and exposed to public ignominy and disgrace, and was otherwise greatly damnified.

Second count alleged the writing, composing, and publishing of the aforesaid defamatory words by the plaintiff of the defendant, and of him in relation to his business, with the innuendoes as in first count.

* We are indebted for a note of this case to Mr. Bligh, Barrister, of Halifax. It should have appeared before, but was crowded out by a press of other matter.

Third count, repeating all the prefatory averments in the first count, alleged that defendant falsely and maliciously printed and published and circulated of and concerning the plaintiff, and of and concerning him in relation to his said business in the said book, the false, scandalous, and malicious and defamatory words and matters following, viz. :—

[Here followed the alleged defamatory matter.]

The defendant thereby meaning that the plaintiff was notorious as a shipowner for the practice of overloading his ships and for a systematic and reckless disregard of the lives of the crews of his said ships, and that by such overloading he had recklessly and wickedly sacrificed at least 105 lives out of the crews of his said ships, and more the particulars of which were not known, and that it was awful to contemplate the loss of human life from the operations of the plaintiff alone in his said business, and that the plaintiff, on being threatened with exposure in the House of Commons, turned craven and coward, and was conscience struck at his own guilt. Whereby the plaintiff suffered such damage as in the first count is alleged.

Fourth count alleged the composing, writing, and publishing of the same.

Fifth. And also repeating all the prefatory averments in the first count mentioned, that the defendant falsely and maliciously printed and published and circulated in the aforesaid book of and concerning the plaintiff, and of and concerning his relation to his said business the false, scandalous, malicious and defamatory words and matters following, that is to say :—

[Setting out other defamatory matter.]

The defendant thereby meaning that the plaintiff was one of a small minority of bad men, who were, and that the plaintiff in fact personally was, guilty of evil practices in his said business, and of recklessly overloading his said ships for his private profit, and thereby of wrongfully, heartlessly and wickedly endangering the lives of "the crews of the said ships, and that the plaintiff was one of three out of the said minority of bad men who had obtained a seat in Parliament, and that he was a man of evil character and repute, and properly classed with one John Sadleir, deceased, who having been a Member of Parliament, was yet notorious as a forger and swindler, and with one William Roupell, who having also been a Member of Parliament, was yet notorious for forgery, perjury, and fraud, and that the plaintiff was one of the two or three called in the north, "the greatest sinners in the trade," and that the plaintiff was in fact one of the greatest sinners in his said business, and that he recklessly, wilfully, and purposely overloaded his said ships, after having caused them to be over-insured, thereby wrongfully and wickedly endangering the lives of the crews of his said ships, in order that he, the plaintiff, might augment his gains and reap a profit from fraudulent over-insurance, being utterly callous as to the loss of human life, and that there was by the plaintiff's procurement a systematic overloading of his said ships, so that whether they came safe to hand or were lost he might receive in the one case more than the full and fair profit of a voyage, or in the other, more than the full value of the said ships from the underwriters, and that the plaintiff was notorious for habitual and excessive overloading his said ships to an extent endangering their safety and that of their crews, and also for his reckless disregard of the lives of the crews of the same, and that by such overloading and disregard the plaintiff had caused the loss of seven of his said ships, and had caused the deaths by drowning of over one hundred men of the crews of the said ships in less than two years, and that by reason of the premises the plaintiff was one of the men in whose ships the insurance brokers at Lloyd's had to warrant the underwriters that the cargoes they offered for insurance should not be shipped in the plaintiff's vessels before they would underwrite the policies, whereby the plaintiff suffered such damage as in the said first count is alleged.

Sixth count alleged the composing, writing, and publishing of the same with the innuendoes.

Pleas :—First, not guilty; secondly, "that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant, or as the words of another person or other persons respectively, are true in substance and in fact;" thirdly, the defendant, as to so much of the declaration as relates to the printing and publishing, and causing and procuring to be printed and published, and to the writing, composing, and publishing by the defendant of the said alleged words and matters respectively without the alleged respective meanings, says that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant or as the words of another person or other persons respectively, are true in substance and in fact.

Philbrick, in support of his motion—These pleas in this general form ought not to have been allowed. [BOVILL, C. J.—It is the com-

mon form at the present day.] The older authorities uniformly show that the plea of justification in such a case must contain specific allegations. [BOVILL, C. J.—And so specific as not to be open to special demurrer]. Nowadays there are cases where a general plea is allowed *with particulars*, yet never where the libel imputes a *criminal charge*. In *Behrens* v. *Allen* (8 Jur. N. S. 116), Willes J. said (p. 121) "*I'Anson* v. *Stuart* makes it clear that before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true." And in the notes to *I'Anson* v. *Stuart* (1 Sm. I. C. 6th edit., p. 67), it is stated that "A plea of justification, therefore, to declaration in slander or libel must contain a specific charge, set forth with certainty and particularity. . . . . Since the Common Law Procedure Act, 1852, a practice has prevailed of pleading in general terms that the matters in the declaration complained of are true in substance and in fact. . . . This mode of pleading is clearly insufficient where the libel or slander complained of does not consist of a distinct statement that particular facts have occurred, which statement may be deemed to be incorporated in the plea which asserts in general terms the truth of the libel." During the argument in *Behrens* v. *Allen* (*sup.*) Willes, J., said, "*I'Anson* v. *Stuart* (1 T. R. 750) adverts to the distinction between the case where the plea states in justification an indictable matter, and where it states what is not of that character. In the latter case I have always at chambers allowed the plea, the defendant furnishing particulars." [DENMAN, J. — "In *Behrens* v. *Allen* (8 Jur. N. S. 118), where a declaration in libel complained of charges made by the defendant against the plaintiff's honesty, which were mostly of a specific nature, the court allowed a general plea of justification, the defendant giving particulars of the charges intended to be justified; and this course has been conveniently pursued in many cases." (See note to *I'Anson* v. *Stuart*, *sup.*) [BOVILL, C. J.—Ever since I have been on the Bench I do not remember any instance where a plea of justification has not been merely "true in substance and fact," whether the charge in the declaration was specific or not. The only effect of requiring the defendant to plead specially is that he raises an argument and discussion, not on the real facts of the case, but on the facts which some ingenious pleader may put on the record, and I find that a general plea, with particulars, leads to no inconvenience]. In *Jones* v. *Bewick* (L. Rep. 5 C. P. 32) the defendant, in an action for libel, pleaded that the defamatory matter in the declaration complained of was and is true in substance and in fact. The court ordered him to give particulars of the facts and matters he relied on to justify the libel, or in default that the plea should be struck out. BOVILL, C. J.—That case will illustrate the convenience of the modern system of particulars as compared with a special plea; the defendant had written of the plaintiff as "Old Perjury Jones," and the consequence was that he might have proved perjury committed in any one year during the whole lifetime of the plaintiff. So, we ordered particulars, as the charge was too general, and then when they were given what was the use of a special plea? [GROVE, J.—What distinction do you make between the charge of an indictable offence and any other defamation?] When a charge of an indictable offence is complained of in the declaration, the plaintiff has a right to have the full statement of the matters on the record, so that it remains for a testimony of his character having been cleared. [BOVILL, C. J.—The same effect would follow from a verdict for the plaintiff on the plea of Not Guilty only. The object here is to hamper the defendant in pleading to your innuendoes, whereas, if the facts were in particulars only the whole matter would go to the jury. GROVE, J.—A constant cause of new trials in such actions used to be that some trifling allegation in a special plea was not justified, and an immense expense and inconvenience followed.] The statements in particulars are made with much more looseness than in a special plea, in which nothing more is put than the defendant may be able to prove. In *Jones* v. *Bewick* (*sup.*) Keating, J., said, "I doubt whether such a plea should be allowed at all." Here the charge is of a most serious kind. [BOVILL, C. J.—In the recent case of *Odger* v. *Waterlow* (unreported) the charge amounted to one of treason.] And here in effect to murder, viz., that the plaintiff sent ships to sea with the avowed object of sinking them. In Bullen and Leake's Precedents of Pleading a note to the form of plea of justification says (p. 613), "When the charges contained in the libel or slander, instead of being specific, are general, and particularly when they impute indictable matter, a general form of plea ought not to be used. It is contrary to the essential objects of pleading, namely, that the other side should be informed of what facts are to be heard, and that

the court should be able to judge whether the facts relied on are, if true, sufficient in law. The former object may no doubt be attained by the delivery of particulars, but there is no sufficient reason why the proper office of pleading should be superseded by this more complicated and expensive substitute. In practice, too, it is a matter of frequent experience that imputations are sought to be justified in a general form which no one could attempt to justify specifically; and thus the test which pleading affords, even to the pleader himself, of the validity of a defence, is lost. The other object, that of enabling the court to judge of the sufficiency in law of the justification, is unavoidably sacrificed by a general plea, the plaintiff is, in effect, precluded from obtaining the opinion of the court (and of a court of error) on the question whether the facts justify the imputation, and the matter has to be left in the hands of the jury in cases most peculiarly open to feeling and prejudice. And, after all, there remains no record of the distinct determination of any particular facts which can be afterwards binding on the parties." [He referred to passages of the libel charged in the declaration.] If the pleas were allowed at all it should have been made a condition that particulars should be given.

BOVILL, C. J.—I am of opinion that the most convenient course in actions for libel, as a general rule, although there may be exceptions, is that a plea of justification should be allowed in a general form. The old system of pleading a special justification led to all kinds of inconveniences and difficulties, according to my experience. A defendant who desired to plead something which might or might not be a justification, framed his plea in such form that he might possibly obtain judgment on the verdict of the jury on one interpretation of the plea when the interpretation put on it by the court might be another, and so, contrary to the merits of the case, the defendant might succeed. On the other hand, in many cases, parties were disposed to insert allegations without foundation to make the plea good on the face of it; that occupied the court constantly in determining a state of facts in the plea other than the real facts of the case, which might fall far short of a justification. Although the object of pleading specially was in order that the plaintiff might have notice of what was intended to be charged against him, it seems to me that a special plea is very unlikely to inform him of that, and that the very object of giving information to the plaintiff, and to prevent the defendant going into a general statement, is obtained by a liberal allowance of particulars, so that the plaintiff may not be taken by surprise, and the trial and judgment of the court may proceed on the real facts. As to an instance given by Mr. Philbrick of a plea as to part, and not as to the residue of the declaration, so far as the plaintiff is concerned, that is an advantage to him, for if the imputations thrown out are well founded the defendant obtains the verdict, if not, the plaintiff will recover. I see no inconvenience in this course, and after an experience of some years I have come to the conclusion that the most satisfactory course is to allow a general plea and order particulars thereof, if required afterwards, and particulars of such kind that the parties may not be misled on one side or the other. Therefore I think the order of my brother Cleasby ought to be upheld, and the rule refused.

GROVE, J.—I am of the same opinion. I can recollect a great many cases in which I have been counsel either for the plaintiff or for the defendant, where there were special pleas of justification, that much more time of counsel was occupied in ascertaining how much must be proved and how much might be material, than in actually finding out the merits to be tried. This gave rise to great technicality and many new trials, and I think the modern way of pleading is of benefit in elucidating the merits of the case. Mr. Philbrick says all that he wishes is that the real substantial question should be tried. Now, it is best that that should be in the issue which goes to the real merits of the case, and to prevent the plaintiff being taken by surprise, particulars may be given which would afford all information required. Thus the whole matter will be fairly laid before the jury.

DENMAN, J.—I also think this rule ought to be refused. The defendant is charged with publishing a book containing libellous matters, and the plaintiff has had an opportunity of selecting a large quantity of passages which he says reflect libellously on him. Then the defendant pleads a general plea, saying the allegations are true in substance and in fact. The question raised is whether such general plea should be allowed where the charges are of so serious a character. Now in my judgment the fairest mode of proceeding is to allow a general plea in such cases as this, with the power in the plaintiff to obtain particulars of the occasion on which, and circumstances under which, certain parts of the statement were made in the publication of which the plaintiff complains.

The court has always been liberal in allowing such particulars, and we cannot assume that they would not be allowed. Mr. Philbrick relied on certain expressions of my brothers Keating and Smith in *Jones* v. *Bewick*, but those observations must be taken as applicable to the particular case in which they were used, and the mere fact that in *Jones* v. *Bewick* Keating J. doubted whether the plea should be allowed, amounts only to a doubt as to whether it should be allowed in that particular case, because the practice of the court for a considerable time has been to allow such plea, and to grant particulars. I agree with my Lord that there may be cases in which such rule ought not to be adopted, although I do not think this is such a case, and therefore I am of opinion that this rule should be refused.

Rule refused.

COURT OF PROBATE.

BOUGHTON AND MARSTON v. KNIGHT AND OTHERS.

Will—Testamentary capacity.

Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind.

Banks v. *Goodfellow* (22 L. T. Rep. N. S. 813; 5 L. Rep. Q. B. 549), considered.

[23 L. T. N. S. 562—June 21, 1873.]

John Knight, deceased, late of Henley Hall, in the county of Salop, died 7th Sept. 1872, aged sixty-nine, leaving a will, bearing date 27th Jan. 1869. This was propounded by the plaintiffs, Sir Charles Henry Rouse Boughton and Mr. Edward Marston, the executors, and it was opposed by the defendants, the three sons of the deceased, and the children of a deceased daughter, on the ground that the deceased, at the time of the execution of the will, was not of sound mind.

The testator was married in 1827, and shortly after his marriage removed to Brussels, where he resided until 1843. His wife died in 1842, and in 1858, on the death of his father, he came into possession of considerable landed property in Shropshire. At his death his personal estate was of the value of £62,000; his reality was of the value of £1,500 a year. The will was prepared by Mr. Marston, who was a solicitor at Ludlow, and who was recommended to him at his desire by Sir Charles Boughton. By the will the testator gave legacies of £8,000 to his son James, £7,000 to his son Charles, and a life interest in £10,000 to his son John, £10,000 to his brother Humphrey, £10,000 to be divided between the daughters of his deceased brother Thomas, £1,500 to his sister, Mrs. Mansfield; £1,000 to each of his executors, and then smaller legacies, amounting together to £1,300. He appointed Sir Charles Boughton residuary legatee and devisee, and he also named him joint executor with Mr. Marston.

In support of the will the plaintiffs relied on the fact that the testator, who was admittedly of eccentric habits, and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it was alleged, that besides labouring under mental perversion in some other particulars, the deceased had conceived an insane aversion to his children, and that he was actuated by it to dispose of his property in the manner in which it was purported to be conveyed by the will.

Sir C. Boughton was a neighbour of the testator, and was on friendly but not on intimate terms with him.

The case was tried before Sir J. Hannen and a special jury, and the trial extended over thirteen days in the month of March.

Serjt. *Parry* (with him *Day*, Q. C., and *Inderwick*), for the plaintiffs.

Sir *J. B. Karslake* (with him *Lloyd*, Q. C., Dr. *Swabey*, and *C. A. Middleton*), for the defendants.

In the course of his summing up to the jury, Sir James Hannen made the following observations:—The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will, on the 27th Jan., 1869, was of sound mind, memory, and understanding. In one sense, the first phrase, "sound mind," covers the whole subject; but emphasis is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty. Above all, there must be understanding, to comprehend their relations to himself and their claims upon him. But, as I say, for convenience, the phrase, "sound mind," may be adopted, and it is the one which I shall make use of throughout the rest of my observations. Now you will naturally expect from me, if not a definition, at

least an explanation of what is the legal meaning of those words, "a sound mind;" and it will be my duty to give you such assistance as I am able, either from my own reflections upon the subject, or by the aid of what has been said by learned judges whose duty it has been to consider this important question before me. But I am afraid that, even with their aid, I can give you but little help, because, though their opinions may guide you a certain distance on the road you have to travel, yet where the real difficulty begins—if difficulty there be in this case—there you will have to find or make a way for yourselves. But I must commence, I think, by telling you what a "sound mind" does not mean. It does not mean a perfectly balanced mind. If it did, which of us would be competent to make a will? Such a mind would be free from the influence of prejudice, passion, and pride. But the law does not say a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, of frivolous, of mean, or even of bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills, in a vast majority of cases, depends upon such nice and fine considerations that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every man is left free to make choice of the persons upon whom he will bestow his property after his death, entirely unfettered as to the selection which he may think fit to make. He may wholly or partially disinherit his children, and leave his property to strangers, to gratify his spite, or to charities to gratify his pride; and we must respect, or rather I should say we must give effect to, his will, however much we may condemn the course which he has pursued. In this respect the law of England differs from the law of other countries. It is thought better to risk the chance of an abuse of the power arising, than altogether to deprive men of the power of making such selection as their knowledge of the characters, of the past history and future prospects of their children or other relatives may demand; and we must remember that we are here to administer the English law, and we must not attempt to correct its application in a particular case by knowingly deviating from it. I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quality of intellect which is requisite to constitute testamentary capacity. I desire particularly, now and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question—one in which the good sense of men of the world is called into action, and that it does not depend either upon scientific or legal definitions. It is a question of degree, which is to be solved in each particular case by those gentlemen who fulfil the office which you now have imposed upon you; and I should like, for accuracy's sake, to quote the very words of Lord Cranworth, to which I referred in the observations which I had to make on a former occasion, and from which Sir John Karslake, in his opening speech, quoted a passage. In the case of *Boyse* v. *Rossborough* (6 H. of L. Cas. 4), in the House of Lords, Lord Cranworth made use of these words:—"On the first head, the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect—ever degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted the ties of domestic life, or, if unhappily, they have been severed, a wide deviation from the ordinary type may be expected, and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider departure from the ordinary type must be expected; we must not easily assume that because a man indulges his humours in unaccustomed ways, that he is therefore of unsound mind. We must apply some other test than this, of whether or not the man is very different from other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this—was the man labouring under delusions? "If he laboured under delusions, then to some extent his mind must be unsound." But though we

have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, what is a delusion? On this subject an eminent judge, who formerly sat in the court, the jurisdiction of which is now exercised here, has quoted with approbation a definition of delusion, which I will read to you. Sir John Nicoll, in the famous case of *Dew* v. *Clark* (1 Hagg. 11), as to which I will have to say a word to you by-and-bye, says:—"One of the counsel"—that counsel was Dr. Lushington, who afterwards had to consider similar questions—"accurately expressed it, it is only the belief of facts which no rational person would have believed that is insane delusion." Gentlemen, in one sense, that is arguing in a circle; for, in fact, it is only to say that that man is not rational who believes what no rational man would believe; but for practical purposes it is sufficient definition of a delusion, for this reason, that you must remember that the tribunal that is to determine the question, whether judge or juryman, must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing; therefore, the man who believes it is insane. Nay, more; you must not say, I should not have believed such and such a thing; therefore, the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it. Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you would have to give is, I cannot understand it; then it is of the necessity of the case that you should say that that man is not sane. Sir John Nicoll, in a previous passage, has given what appears to me to be a more logical and precise definition of what a delusion is. He says:—"The true criterion is, where there is a delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in a degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind." I believe you will find that that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Now, of course there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experiences in this court. Take the case, which has been referred to, of Mrs. Thwaites. If a woman believes that she is one person of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question, no doubt, arises where the nature of the delusion which is said to exist is this, when it is alleged that a totally false, unfounded, unreasonable—because unreasoning—estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown, that parents—and, I should say in justice to women, it is particularly the case rather with fathers than with mothers—that they may take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which you can feel that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a father exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them mischief or to deprive them of advantage which most men desire, above all things, to confer upon their children—I say there is a point at which, taken by itself, such repulsion and aversion become evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion, consisting solely of aversion to children, is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point. There are usually other aberrations of the mind which afford an index as to the character of the treatment of the children. Perhaps the nearest approach to a case in which there was nothing but the dislike on the part of a parent to his child on which to proceed was the case of *Dew* v. *Clark* (*sup*). There were indeed some minor things which were adverted to by the judge in giving his judgment, but he passes over these, as it was natural he should do, lightly; as, for instance, there was in that case the fact that the gentleman who had practised medical electricity attached extraordinary importance to that means of cure in medical practice. He conceived that it might be applied to every purpose, among the rest even to assisting of women in childbirth. But those were passed over, not indeed cast aside altogether, but passed over by the judge as not being the basis of his judgment. What he did rely on was, a long, persistent course of dislike of his only child, an only daughter, who, upon

the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father no doubt entertained, so far as his nature would allow him, the warmest affection; but it broke out into these extraordinary forms, namely, he desired that that child's mind should be subject entirely to his own; that she should make her nature known to him, and confess her faults, as, of course, a human being can only do to his Maker; and because his child did not fulfil his desires and hopes in that respect, he treated her as a reprobate, as an outcast. In her youth he treated her with great cruelty. He beat her; he used unaccustomed forms of punishment, and he continued throughout her life to treat her as though she were the worst, instead of, apparently, one of the best of women. In the end he left her indeed a sum of money sufficient to save her from actual want, if she had needed it, for she did not need it. She was well married to a person perfectly able to support her; and therefore the argument might have been used in that case, that he was content to leave her to the fortune which she had secured by a happy marriage. He was not content to leave her so. He did leave her, as I say, a sum of money which would have been sufficient, in case of her husband falling into poverty, to save her from actual want; and, moreover, he left his property not to strangers—not to charities—but he left his property to two of his nephews. He was a man who, throughout his life, had presented to those who met him only in the ordinary way of business, or in the ordinary intercourse of life, the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals, and learning all that could be learnt there, and he amassed a very large fortune—at least a large fortune, considering what his commencement was—a fortune of some £25,000 to £30,000, by the practice of his profession. Yet, upon the ground which I have mentioned, that the dislike which he had conceived for this child reached such a point, that it could only be ascribed to mental unsoundness, that will so made in favour of the nephews was set aside, and the law was left to distribute his property without reference to his will. Now I say usually you have the assistance of other things, besides the bare fact of a father conceiving a dislike for his child, by which to estimate whether that dislike was rational or irrational; and in this case, of course it has been contended that you have other criteria by which to judge of Mr. Knight's treatment of his children in his lifetime, and his treatment of them by his will after his death. You are entitled, indeed you are bound not to consider this case with reference to any particular act, or rather you are not to confine your attention to a particular act, namely, that of making the will. You are not to confine your attention to the particular time of making the will, but you are to consider Mr. Knight's life as a whole with the view of determining whether, in Jan. 1869, when he made that will, he was of sound mind. I shall take this opportunity of correcting an error, which you indeed would not be misled by, because you heard my words; but I observe that in the shorthand report of what I said in answer to an observation made by one of you gentlemen in the course of the cause, a mistake has been made, which it is right I should correct; because, of course, everything that falls from me has its weight, and I am responsible for my words to another court which can control me if I am wrong in the directions I give you. Therefore I beg to correct the words that have been put into my mouth, when I said that if a man be mad admittedly in 1870, and his conduct is the same in 1868 as it was in 1870, when he was, as we will assume, admittedly mad, you have the materials from which you may infer the condition of his mind in the interval. I have been reported to say, "from which you *must* infer the condition of his mind." That is of course what I did not say. Now, gentlemen, I think I can give you assistance by referring to what has been said on this subject in another department of the law. Some years ago, the question of what amount of mental soundness was necessary in order to give rise to responsibility for crime was considered in the case of *Macnaghten*, who shot Mr. Drummond under the impression that he was Sir Robert Peel, and the opinion of all the judges was taken upon the subject; and though the question is admittedly a somewhat different one in a criminal case as to what it is here, yet I shall explain to you, presently, in what that difference consists; and there is, as you may easily see, an analogy which may be of use to us in considering the point now before us. There, Tindal, C. J., in expressing the opinion of all the judges (one of them was a very eminent judge, who delivered an opinion of his own, but it did not in any way differ from the other judges), says:—"It must be proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the

nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Now that, in my opinion, affords as nearly as it is possible a general *formula* that is applicable to all cases in which this question arises, not exactly in those terms, but in the manner in which I am about to explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall not be able to distinguish in the act he is doing right from wrong. Now a very little degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act he is doing when he kills another; a very little degree of intelligence is sufficient to enable a man to know whether he is doing right or wrong when he puts an end to the life of another; and accordingly he is responsible for crime committed if he possesses that amount of intelligence. Take the other cases that have been suggested. Serjt. Parry, with the skill which characterises all that he does as an advocate, endeavoured to alarm your mind, as it were, against taking a view hostile to him, by representing that if you come to the conclusion that Mr. Knight was of unsound mind in Jan. 1869, you undo all the important transactions of his life. In the first place, it is obvious that the same question which is now put to you on behalf of the plaintiff in this case would be put to any jury who had to determine the question with reference to any other act of his life, namely, whether at the time of the act done he was of sufficient capacity to understand the nature of the act he was doing. But in addition to that, take, for instance, the question of marriage. The question of marriage is always left in precisely the same terms as I have said to you, it seems to me it should be left in almost every case. When the validity of the marriage is disputed on the ground that one or other of the parties was of unsound mind, the question is, was he or she capable of understanding the nature of the contract which he or she was entering into? So it would be with regard to contracts of buying or selling; and, to make use of an illustration—a very interesting one given us by the learned serjeant—take the case of the unhappy man who, being confined in a lunatic asylum, and with delusions in his mind, was called to give evidence. First of all the judge had to consider, was he capable of understanding the nature and character of the act that he was called upon to do when he swore to tell the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If he was, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things, responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. Because you will easily see it involves a larger and a wider survey of facts and things than any one of these matters to which I have called your attention. Every man, I suppose, must be conscious that in an inmost chamber of his mind there resides a power which makes use of the senses as its instruments, which makes use of all the other faculties. The senses minister to it in this manner; they bring, by their separate entrances, a knowledge of things and persons in the external world. The faculty of memory calls up pictures of things that are passed; the imagination composes pictures and the fancy creates them, and all pass in review before this power, I care not what you call it, that criticises them and judges them, and it has moreover this quality which distinguishes it from every other faculty of the mind, the possession of which indeed distinguishes man from every other living thing, and makes it true in a certain sense that he is made in the image of God. It is this faculty, the faculty of judging himself; and, when that faculty is disordered, it may safely be said that his mind is unsound. Now I wish to call your attention to a case which has been frequently adverted to in the course of this cause. It is the case of *Banks* v. *Goodfellow*, a judgment of the Court of Queen's Bench, at a time when I had the honour of being a member of it. I was, therefore, a party to the judgment; but everybody, or rather, I should say, all the members of the legal profession who hear me, will, of course, recognise the eloquent language of the great judge who presides over that court, the present Lord Chief Justice. But I was a party to the judgment, and, of course, while bound by it, I am bound by it only in the sense in which I understand its words. I think there can be no room for misconception as to their meaning, but I must explain to you the scope and bearing of it. That was a case in which a man who had, indeed, been subject to delusions before and after he made his will, was not shown to be either under the influence of those delusions at the time, nor, on the other hand,

was he shown to be so free from them that if he had been asked questions upon the subject he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for years, and to whom he had always expressed his intention of leaving his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, or it was his duty to take care of her after his death. It was left to the jury to say whether he made that will free from the influence of any of the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered, and it was held that, under those circumstances, the jury finding the fact in that way, that finding could not be set aside. I will not, of course, trouble you with reading the whole of the judgment, which, however, I may say, would well reward the trouble of reading it by laymen as well as by professional men, but I shall pick out passages to show you how carefully-guarded against misapprehension this decision is. I shall have occasion by-and-bye to call your attention to instances in it which I think it has been sought to apply it incorrectly in the argument which has been addressed to you. Now, at one passage of the judgment, the Lord Chief Justice says this:—"No doubt, when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will mader under such circumstances becomes sufficiently strong when the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded." But, in an earlier passage in the judgment, the Lord Chief Justice lays down with, I think I may say, singular accuracy, as well as beauty of language, what is essential to the constitution of testamentary capacity. Sir John Karslake anticipated me in many of the passages I should have read to you. I shall not read all he read, but I shall select this passage, as containing the very kernel and essence of the judgment:—"It is essential to the exercise of such a power" (that is the power of making a will), "that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affection, pervert his sense of right, or prevent the exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." I have no fear, when rightly understood, of that case being misapplied. [His Lordship then proceeded to consider the evidence in the case. Having done so at considerable length, he pointed out that while the witnesses called on behalf of the plaintiffs had few opportunities of meeting the deceased, and could only say that they had never seen anything odd or strange in his behaviour, the witnesses for the defence, who deposed to his insanity, were in constant association with him, and had therefore ample means of observing his true and inner life. The learned judge continued:]—It is for you to say whether the accumulation of this evidence for the defendants has not this effect on your mind, that it leads you to the conclusion that whatever fluctuations there may have been in the condition of Mr. Knight's mind, for some years before he made that will he had been subject to delusions, and especially he had been subject to delusions with reference to the character, the intention, the motives of his son's acts; and if you come to the conclusion that he was subject to these delusions, I beg to particularly impress on your minds that it is the duty of the plaintiffs to satisfy you that at the time when the testator made that will he was free from those delusions, or free from their influence. The

burden of proof, as it is called, is upon those who assert that the testator was of sound and disposing mind. In considering that question you cannot, I am sure, put aside the contents and the surrounding circumstances of that will. Then, on considering whether or not he was free from delusions as to the characters of his several sons whom he passed over in the disposition of his estate, though he left them sums of money out of his personalty, you cannot disregard the fact that he selected one having no natural claims upon him, of whom he knew little, and to whom he was under no obligations, which are usually recognised as the foundation on which to make a gift of this kind. This must be taken into your consideration in determining whether at the time he did this those prevailing delusions which I have referred to had passed away, or were utterly inoperative.

The jury found that at the time the will was executed the testator was not of sound mind.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR JANUARY, FEBRUARY, MARCH, AND APRIL, 1873.

(Continued from page 303.)

Equitable Security.

The owner of a farm deposited deeds, dated 1774, by way of security for a loan, stating them in a letter to be title-deeds of said farm, and the deeds were so received in good faith. Subsequently said owner deposited later title-deeds of said farm with the plaintiff, who had no notice of the previous transaction, as security for another loan. *Held*, that said letter, together with the deposit of said deeds of 1774, created an equitable security. The depositee was not bound to examine the deeds, and was not bound by constructive notice of their contents.—*Dixon* v. *Muckleston*, L. R. 8 Ch. 155.

Evidence.—*See* Damages, 4; Principal and Agent, 1; Trover.

Executors and Administrators.

1. A bill alleged that the defendant was executor of a testatrix, and, before probate, had possessed himself of part of the personal property of the testatrix, and prayed for general administration. The defendant pleaded that no legal representative of the testatrix had been appointed. *Held*, a good plea.—*Cary* v. *Hills*, L. R. 15 Eq. 79.

2. A testator was a partner in a firm under an agreement, whereby, on the death of a partner, his share was to be determined and taken from the firm in two years. The testator appointed three executors, one of whom was his partner. His share was not withdrawn, but interest was allowed upon it. All the residuary legatees to whom such share belonged, acquiesced in this arrangement, except the plaintiff, who filed a bill demanding an account and a share in the profits which had arisen from the employment of said share in the business. *Held*, that the plaintiff was not entitled to an account or share in said profits.—*Vyse* v. *Foster*, L. R. 8 Ch. 308.

3. Action against an executor. Plea, *plene administravit*. Judgment for plaintiff. The same plaintiff brought an action on said judgment, suggesting a *devastavit*. The defendant pleaded facts, showing that assets had come to his hands before said judgment, which had been misappropriated, if at all, with consent of the plaintiff. *Held*, that if said facts constituted an answer, they would have been a defence upon the plea of *plene administravit* in the first action, and therefore could not be set up as a defence to the suggestion of a *devastavit*.—*Jewsbury* v. *Mummery*, L. R. 8 C. P. 56.

See Payment.

Fraudulent Preference.—*See* Bankruptcy.

General Average.—*See* Arbitrator.

Gift.—*See* Advancement.

Guardian.

Where a person has been duly appointed by will under 12 Car. 2, c. 24, § 8, to be guardian of the testator's child, a common-law court has no discretion to refuse a writ of *habeas corpus* to enable the guardian to obtain possession of the child, unless the child is of an age to choose a guardian for herself, or the guardian is an improper person.—*In re Andrews*, L. R. 8 Q. B. 153.

Habeas Corpus.—*See* Guardian.

Highway.—*See* Way.

House.—*See* Streets.

Husband and Wife.

A woman deposited money received as executrix in a bank to her account as executrix. Her husband paid money to said account after it had ceased to be used for executorship purposes, and checks were drawn by the wife for payment of debts due by her husband and for household expenses. The husband died. *Held*, that the wife was the agent of the husband in receiving and drawing the money deposited by the husband, and that such money belonged to the husband's estate, and not to the wife.—*Lloyd* v. *Pughe*, L. R. 8 Ch. 88; s. c. L. R. 14 Eq. 241; 7 Am. Law Rev. 475.

Indecent Assault.—*See* Assault.

Indictment.

Indictment for conspiracy by a trader to remove his goods within four months before presentation of a bankruptcy petition against him. Verdict of guilty. *Held*, that the omission to allege that the trader had been adjudged bankrupt was cured by verdict.—*Heymann* v. *The Queen*, L. R. 8 Q. B. 102.

Infringement.—*See* Copyright.

Injunction.

1. Creditors of C. began actions in New York on bills of exchange accepted, payable and dishonored in London, wtih a view to attach debts due C. from various New York houses. *Held*, that the court in England would not grant an injunction to restrain said actions in New York.—*In re Chapman*, L. R. 15 Eq. 75.

2. A corporation having compulsory powers for supplying gas within a borough, began to supply gas within a neighboring township. The

plaintiff, who had similar powers within said township, prayed an injunction to restrain said corporation from supplying gas within said township, alleging that the corporation was about to supply a mill with gas, which otherwise would have been supplied by the plaintiffs. *Held*, that there was no such allegation of private injury as the court would allow as the foundation of a bill.—*Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R. 15 Eq. 167.

See INSURANCE, 2; NUISANCE.

INSOLVENCY.—*See* BANKRUPTCY, 3.

INSURABLE INTEREST.—*See* INSURANCE, 3.

INSURANCE.

1. The plaintiff requested a broker to effect insurance for him upon chartered freight in the *Cambria*. The broker saw certain information in Lloyd's list, a paper which was regularly taken by the defendant, which upon examination he did not believe related to the *Cambria*, and in good faith he requested the defendant to insure said freight without disclosing said information, which was in fact material. A slip was accordingly initialled, but before the policy was made out, said information came to the knowledge of the defendant. A policy was, however, filled out and delivered to the broker. A few days later, further information was received showing that the *Cambria* was a total loss. *Held* (by MARTIN and BRAMWELL, B.B., CLEASBY, B., dissenting) that the defendant could not be assumed to know the contents of Lloyd's list, but that the policy was valid, as the defendant was by his actions estopped from denying the policy was good; or had elected, by filling out the policy, to treat the contract as valid.—*Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 40.

2. A bill was filed by an insurance company for cancellation of a policy on account of misrepresentation, and a few days later an action at law was begun on the policy. The company then prayed for an injunction to restrain the action at law. *Held*, that the court of equity had jurisdiction of the case, but that a court of law was a more convenient tribunal for trial of the facts. Injunction refused.—*Hoare* v. *Bremridge*, L. R. 8 Ch. 22.

3. The plaintiffs, shipowners, obtained an open policy to a specified amount, upon cotton *per* steamers from A. One hundred and two bales of cotton were received by the plaintiff's agent at A., with directions from the shipper to ship at the latter's risk. By mistake said agent gave a bill of lading under which the bales were at the plaintiff's risk, but thinking they were at the shipper's risk, he did not advise the plaintiffs, and the bales were not declared upon the policy. The plaintiffs declared on other cotton on said policy in the order of its shipment. Said one hundred and two bales were lost, and the shipper claimed payment under his bill of lading. Thereupon the plaintiffs inserted in said declaration on the policy a declaration of said one hundred and two bales. It was found that by usage of insurance business, where a policy is effected on goods by ships to be declared, the policy attaches to the goods as soon and in the order in which they are shipped, and that the assured was bound to declare them in such order. In case of mistake in the order of declaration, it is the duty of the assured to correct the declarations, which is sometimes done even after loss. *Held*, that the plaintiffs were liable for the loss of said bales under the bill of lading, and therefore had an insurable interest in the bales; and that both by said usage and by law declarations might be altered as above in the absence of fraud.—*Stephens* v. *Australasian Insurance Co.*, L. R. 8 C. P. 18.

See PRIORITY, 1.

INTEREST.

A trustee for a company paying his own money on behalf of the company in accordance with a contract obliging him to make such payments, is entitled to interest on such payment on the winding up of the company.—*In re Beulah Park Estate. Sargood's Claim*, L. R. 15 Eq. 43.

See PARTNERSHIP.

JOINT TENANT.—*See* LEGACY, 2.

JURISDICTION.

On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order, or to entertain any fictitious question as to title-deeds or accounts, in order to found jurisdiction.—*Pryse* v. *Pryse*, L. R. 15 Eq. 86.

See INJUNCTION, 1; INSURANCE, 2.

LAND.

Adjoining arches supporting a railway was certain land used as an embankment to the arches, and a strip of land running alongside the railway and necessary for the purpose of repairing the arches. *Held*, that said pieces of land were "land" under 25 & 26 Vict. c. 102, § 77.—*Higgins* v. *Harding*, L. R. 8 Q. B. 7.

LANDLORD AND TENANT.—*See* DISTRESS.

LEASE.—*See* CONTRACT.

LEGACY.

1. A testator bequeathed one-sixth part of his property in trust for each of his daughters for life, remainder to the children of each daughter respectively upon attaining twenty-one years or marriage; provided any of such daughters should die without leaving a child who should attain twenty-one or marry, then her share in trust for the testator's surviving daughters in equal shares, if more than one, during their respective lives, and after their respective decease for their respective children *per stirpes* and not *per capita*. The testator's daughters were minors when the will was made. Two daughters married, and died leaving children who attained twenty-one; and then a third daughter died leaving no children. *Held*, that the share of said third daughter was divisible between her three surviving sisters and the children of her two sisters who had died.—*Waite* v. *Littlewood*, L. R. 8 Ch. 70.

2. A testatrix directed "at the death of my sisters A. and J. the residue of my property is to pass to my relatives in America." *Held*, that the next of kin of the testatrix in America, living at her death, were entitled as joint tenants.—*Eagles* v. *Le Breton*, L. R. 15 Eq. 148.

See DEVISE; EXECUTORS AND ADMINISTRATORS, 2; PAYMENT.

LETTER.

Where a person applies by letter for shares in a company, *it seems* he will be bound as a shareholder from the moment the letter of allotment is posted although it is never received.—*Wall's Case*, L. R. 15 Eq. 18.

LIEN.—*See* BANK.

LIQUIDATED DAMAGES.—*See* DAMAGES, 3; PENALTY.

LOAN.—*See* BANK.

MARSHALLING ASSETS.—*See* DEVISE, 1.

MASTER AND SERVANT.—*See* NEGLIGENCE, 1; PRINCIPAL AND AGENT, 1.

MEASUREMENT.—*See* COVENANT, 2.

MINE.—*See* DAMAGES, 1; NEGLIGENCE, 4.

MORTGAGE.

W. demised certain estates to L. on long terms by way of mortgage. Subsequently W. conveyed the estates by deed, to which L. was party, but not a conveying party, to C. upon trust for W. as follows: W. was to receive the rents until a certain day, and in case W. then repaid certain sums advanced by L., C. was to reconvey. In case of W.'s default C. was to sell the estates and hold the proceeds in trust to repay L.'s advances and hold the remainder for W. *Held*, that the terms were not surrendered or merged, and that said deed was a mortgage, and was not a deed creating a trust which W. could enforce. —*Locking* v. *Parker*, L. R. 8 Ch. 30.

See DEVISE, 2; EQUITABLE SECURITY; PRIORITY, 2.

NE EXEAT.

A *ne exeat* may be issued against a defendant who has been ordered to pay a sum of money in an administration suit, although the day of payment has not arrived, if he is about to leave the country.—*Sobey* v. *Sobey*, L. R. 15 Eq. 200.

NEGLIGENCE.

1. The daughter of the plaintiff was instantly killed by the defendant's negligence. *Held*, that as the daughter was killed no action lay for loss of her services, or for her burial expenses.—*Osborn* v. *Gillett*, L. R. 8 Ex. 88.

2. By statute a railway company must maintain fences along the line of its railway, for the accommodation of the owners and occupiers of lands adjoining. The plaintiff hired a stable for his horse, with privilege of allowing the horse to graze during the day over land adjoining a railway. One night the horse escaped into said land, strayed through a defective fence on the railway, and was killed. *Held*, that the railway company was liable.—*Dawson* v. *Midland Railway Co.*, L. R. 8 Ex. 8.

3. Action for injuries received by plaintiff in consequence of collision while travelling on defendants' railway. Plea that the plaintiff was carried under a free pass, wherein it was provided that he should travel at his own risk. Replication that the injuries were by reason of the gross and wilful negligence and mismanagement of the defendants. Demurrer. *Held*, that the defendants were not liable. Demurrer sustained.—*McCawley* v. *Furness Railway Co.*, L. R. 8 Q. B. 57.

4. The defendants were a canal company, and the plaintiff proprietor of a coal mine under part of the bed of the canal. Said company was authorized by statute to take land for the canal, the minerals in the land being reserved to the owners thereof, subject to a proviso that in working the same no injury should be done to the navigation. It was also provided that a mine owner wishing to work his mine should give certain notice to the company, which should then inspect the mine, and consent or refuse to allow the same to be worked; in the latter event paying the market price for the same. If the company should omit to give or refuse such consent, the mine owner might work the mine. The plaintiff gave proper notice, but the defendants did not inspect, and refused to purchase the mine. The plaintiff worked the mine without regard to the surface, with knowledge that the effect would be to let down the surface and probably dislocate the slate and admit water, but otherwise was not negligent or unskilful, but took coal in the ordinary manner, and could not otherwise have obtained full benefit of the mine. Consequently, without negligence of the defendants, water entered the mine. The plaintiff brought an action of tort, charging negligent management of the canal, whereby the water escaped to the damage of the mine. *Held*, that the action could not be maintained. *It seems* (KELLY, C. B., and PIGOTT, B.) that the plaintiff was entitled to compensation for the loss of the coal under said act.—*Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. (Ex. Ch.) 42; s. c. L. R. 7 Q. B. 244; 6 Am. Law Rev. 695.

See ARBITRATION; PRINCIPAL AND AGENT, 3.

NOISE.—*See* NUISANCE.

NOTARY PUBLIC.—*See* AFFIDAVIT.

NOTICE.—*See* PRIORITY, 2.

NUISANCE.

Bill for injunction to restrain owners of buildings adjoining the plaintiff's house from causing nuisance by noise and vibration by use of an engine. Discussion on amount and nature of noise necessary to sustain the injunction.—*Gaunt* v. *Fynney*, L. R. 8 Ch. 8.

ORDER OF COURT.

If an order of court has been made to sell at auction, and there has been an attempt to

sell at auction which has failed, the property cannot be sold at private sale without an alteration in the order; and any practice in chambers to the contrary is irregular.—*Berry* v. *Gibbons*, L. R. 15 Eq. 150.

PARTNERSHIP.

By articles of partnership a partner advancing money to the partnership was to be considered a creditor of the partnership in respect of such advance, and was to be allowed interest on the same. The partnership was dissolved. *Held*, that interest must be allowed to the partners on their respective advances. It appears that in general partnership, accounts subsequent to dissolution will not bear interest as between partners.—*Barfield* v. *Loughborough*, L. R. 8 Ch. 1.

See EXECUTORS AND ADMINISTRATORS, 2.

PAYMENT.

A testator directed an annuity to be paid to H. for life, and a "proportionable part of said annuity to be computed to the day of H.'s death from the last preceding day of payment," to the executors or administrators of the said H. Such proportionate part was paid to the husband of H., who never took out letters of administration; and the husband died leaving his son his executor. *Held*, that said payment to the husband of H. was not valid, and that the son might recover said proportionate part.—*Mitchell* v. *Holmes*, L. R. 8 Ex. 119.

See PRINCIPAL AND AGENT, 2.

PENALTY.

Under an award W. was to purchase an annuity of £1200 for D. If such annuity should not be secured as directed the sum of £100 should become due on the last day of each month, until the annuity should be secured; "these monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." W. made default in securing the annuity. *Held*, that said monthly payments of £100, though called a "penalty," was not one which the court would allow to be satisfied except upon the terms of securing the annuity.—*Parfitt* v. *Chambre, ex parte D'Alteyrac*, L. R. 15 Eq. 36.

See DAMAGES, 3.

PERPETUITY.

A testatrix, after stating that she did not confidently feel that her family would not spend her money on the vanities of the world, and that as a faithful servant of the Lord Jesus Christ she felt she was right in returning it in charity to God who gave it, gave personal estate to trustees to make certain annual payments for charitable purposes, and directed that when and so soon as land should at any time be given for the purpose, two almshouses should be built, and surplus appropriated in making weekly allowances to the inmates. *Held*, that the gift was valid, as it was an immediate gift for charitable purposes, although the time of its application was indefinite.—*Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206.

PLEADING.—*See* DAMAGES, 3; EXECUTORS AND ADMINISTRATORS, 1; PLEADING, 3.

POSTING LETTER.—*See* LETTER.

POWER.—*See* CY-PRES.

PRACTICE.—*See* NE EXEAT.

PRESUMPTION.—*See* PRINCIPAL AND AGENT, 1.

PRINCIPAL AND AGENT.

1. By statute railway companies have power to arrest any person committing certain frauds upon them. A station inspector arrested a passenger on a railway under the erroneous belief that he had committed a fraud on the railway company. *Held*, that in the absence of evidence to the contrary it must be inferred that the company had given said inspector authority to arrest under said statute; and that the company was liable for his mistake.—*Moore* v. *Metropolitan Railway Co.*, L. R. 8 Q. B. 36.

2. C., the managing director of the plaintiffs, who were printing a periodical for D., refused to go on with the work without a guarantee. Accordingly the defendant drew a bill on D. and indorsed it to the plaintiffs, with the understanding known to C. that a sum due D. from S. should be appropriated to its payment. Prior to this, C. had lent money on his private account to D., for which he held D.'s acceptance to a draft in C.'s name. When the latter bill fell due, D. gave C. an order on S., which was paid. *Held*, that the manner in which C. received payment of his private debt constituted no defence to an action by the plaintiffs on the first bill, as C. was not acting therein in pursuance of any authority, expressed or implied, from the plaintiffs.—*McGowan* v. *Dyer*, L. R. 8 Q. B. 141.

3. By the rules of a railway company its porters were to prevent passengers going by wrong trains so far as they were able, but it was not their duty to remove passengers from the train. The plaintiff received injuries by being violently pulled from a carriage on said railway by one of its porters, who was under the mistaken belief that the plaintiff was in the wrong carriage. *Held*, that there was evidence upon which the jury might find that the said porter was acting within the scope of his employment, whereby the company would be liable for the plaintiff's injuries.—*Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, L. R. 8 C. P. 148; s. c. L. R. 7 C. P. 415; 7 Am. Law Rev. 297.

4. K. wanted shares in a company. B. told K. he could get a certain number of shares at £3 per share, and was authorized by K. to buy them for him. B., in fact, owned the shares, having bought them at £2 per share. *Held*, that B. was the agent of K., and must repay to K. the difference between the cost of the shares, and the price K. paid for them.—*Kimber* v. *Barber*, L. R. 8 Ch. 56.

PRINCIPAL AND SURETY.—*See* SURETY.

PRIORITY.

1. R. insured his life and assigned the policy in 1860 as security for a debt. R. was adjudged bankrupt in 1862, and in 1868 said debt and policy were transferred for value to the plaintiff, who had no notice of the bankruptcy. In 1871 R. died and the plaintiff gave notice to the office that said policy was mortgaged. Subsequently, notice of R.'s bankruptcy was given to the office. *Held*, that the plaintiff's debt was entitled to priority.—*In re Russell's Policy Trusts*, L. R. 15 Eq. 26.

2. An officer assigned to A. and B., two assignees, separately the money which should be payable on the sale of his commission, and the assignees gave the agents of the regiment simultaneous notice of their incumbrances.—On Oct. 6, the agents received notice from the *Horse Guards* to transfer a sum, payable upon the sale of said commission, to said officer. Previously to said notice said agents had no authority in regard to said sum; and they could not pay it over without a written receipt from said officer. On Oct. 14, A. gave the agents a second notice of his charge. On Oct. 20, said officer sent a receipt as aforesaid to said agents. On Nov. 4, B. gave said agents a second notice of his charge. *Held*, that A.'s charge had priority over B.'s.—*Addison* v. *Cox*, L. R. 8 Ch. 76.

See EQUITABLE SECURITY.

RAILWAY.—*See* DAMAGES, 2; NEGLIGENCE, 2, 3; PRINCIPAL AND AGENT, 1, 3.

RECOUPMENT.—*See* VENDOR AND PURCHASER, 1.

RENT.—*See* VENDOR AND PURCHASER, 1.

RESCISSION OF CONTRACT.—*See* CONTRACT, 2; VENDOR AND PURCHASER, 2.

RIPARIAN RIGHTS.

A stream divided into two branches at E., one branch flowing on into the river Irwell, and the second branch to a farm, where it supplied a trough, the overflow percolating by no defined course into said river. In 1847, W., who owned said farm and land thence to the Irwell, collected said overflow, and carried it by a drain to a mill on the banks of the Irwell. In 1865, W. purchased the land through which said second branch flowed from E. to said farm. In 1867, W. sold said mill, with water in said second branch, to the plaintiff. *Held*, that the plaintiff could maintain an action against a riparian owner above E. for obstructing the flow of the water.—*Holker* v. *Poritt*, L. R. 9 Ex. 107.

RIVER.—*See* RIPARIAN RIGHTS.

SALE.—*See* BANKRUPTCY, 3; ORDER OF COURT; PRINCIPAL AND AGENT, 4.

SECURITY.—*See* BANK, 1; EQUITABLE SECURITY.

SET-OFF.—*See* BANK, 2; COMPANY, 2.

SPECIFIC APPROPRIATION.—*See* BILLS AND NOTES.

SPECIFIC PERFORMANCE.—*See* CONTRACT, 1; VENDOR AND PURCHASER, 2.

STAY OF PROCEEDINGS.—*See* EJECTMENT.

STOPPAGE IN TRANSITU.—*See* BANKRUPTCY, 3.

STREAM.—*See* RIPARIAN RIGHTS.

STREET.

A corporation had power, whenever it should appear to it expedient, to prescribe the street line upon which any house to be built should be erected. The foundations of a church were laid, and the building had made considerable way, when a line was fixed falling within the church limits. *Held*, that a church was a house, and that said line was fixed too late.—*Corporation of Folkestone* v. *Woodward*, L. R. 15 Eq. 159.

SURETY.

1. Plea to an action on a bond, that it was executed by the defendant as surety only, whereof the plaintiff had notice; and that, afterwards, a deed was made between the principal and the plaintiff, and with the consent of the creditors of the principal, whereby the latter conveyed his property to the plaintiff, to be administered for the benefit of the creditors; in consideration whereof the plaintiff and all other creditors released said principal, "in like manner as if he had obtained a discharge in bankruptcy;" and that this was without the consent of the defendant. *Held*, that the defendant was discharged.—*Cragoe* v. *Jones*, L. R. 8 Ex. 81.

2. The defendant gave a bond, which recited that the plaintiff had agreed to employ J. as clerk, on the latter's giving a bond, with sureties, to pay over to the plaintiff all moneys received on the plaintiff's account, and which was conditioned that J. should pay over moneys as aforesaid. To an action on the bond the defendant pleaded, first, that, by the terms of the agreement between the plaintiff and J., the agreement might be terminated by one month's notice, which was afterward, without the consent of the defendant, altered to three months; and, second, that before the default complained of, J. had committed other defaults of the same kind, notwithstanding which the plaintiff had continued to employ J., without notice to the defendant. *Held*, that the first plea was bad, as it did not show that the agreement concerning notice formed any part of the defendant's contract; but that the second plea was good.—*Sanderson* v. *Aston*, L. R. 8 Ex. 73.

See INTEREST.

SURRENDER.—*See* MORTGAGE.

TENANT IN COMMON.—*See* LEGACY, 2.

TITLE.—*See* EQUITABLE SECURITY.

TOLL.

Certain tolls existed from time immemorial upon goods passing to, through, or from the borough of Brecon. A railway company had, under an act of Parliament, acquired land and built a railway through the borough. *Held*, that there could be no toll traverse upon goods carried by the railway company entirely upon their railway or land belonging to them.—*Brecon Markets Co.* v. *Neath & Brecon Railway Co.*, L. R. 8 C. P.

(Ex. Ch.) 157; s. c. L. R. 7 C. P. 555; 7 Am. Law Rev. 485.

Trade.—*See* Covenant; Distress.

Trespass.

Defendant drove his cab on to a railway company's land having the appearance of a public street, and refused to leave when requested to do so on behalf of the company. *Held*, that the defendant was a wilful trespasser.—*Foulger* v. *Steadman*, L. R. 8 Q. B. 65.

See Damages, 1; Negligence, 8.

Trover.

The plaintiff who was in possession of certain goods in a house was told by the defendant that he meant to distrain for rent on the day following, and he would not allow the plaintiff to remove the goods as the latter desired. In an action of trover, *held* (by Kelly, C. B., Bramwell and Pollock, B. B., Martin, B., dissenting), that there was no evidence of a conversion.—*England* v. *Cowley*, L. R. 8 Ex. 126.

Trust.

The trustees under a will built a villa upon part of the testator's land for the purpose of developing the remainder of the land. He had given the trustees no such authority. *Held*, that, as the trustees had *bona fide* laid out a sum to increase the value of the estate, they could only be charged with the loss (if any) caused by such expenditure.—*Vyse* v. *Foster*, L. R. 8 Ch. 309.

2. The defendants received certain proceeds of real estate from two trustees, and subsequently paid the same over to one trustee without the assent or sanction of the co-trustee, and it was in consequence lost to the estate. *Held*, that the defendants must make such loss good to the estate.—*Lee* v. *Sankey*, L. R. 15 Eq. 204.

Verdict.—*See* Indictment.

Ward.—*See* Guardian.

Water.—*See* Riparian Rights.

Way.

A path was dedicated across a field, with a reservation to the owners of the field of the right to plough up the path. The owners ploughed up the path, which in consequence became muddy, and placed hurdles at the sides of the path, which the defendant overthrew in order not to walk in the mud. *Held*, that the defendant had no right to deviate from the path, and was liable in trespass.—*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96.

Will.—*See* Devise; Executors and Administrators, 2; Legacy; Payment.

Winding up.—*See* Company.

Writ.—*See* Guardian; Ne Exeat.

Words.

"*Other*."—*See* Legacy, 1.

"*Relatives*."—*See* Legacy, 2.

"*Surviving*."—*See* Legacy, 1.

REVIEWS.

A Treatise on the Law of Insurance, by S. R. Clarke, of Osgoode Hall, Barrister-at-law.—Monetary Times Office, Toronto, 1873.

This will be found a useful collection of cases on the law of insurance. All the Canadian decisions seem to be referred to on the several branches of fire, marine and life insurance, whilst there is a very full collection of English and United States authorities on fire insurance.

The author does not so much attempt to put forward views of his own, as to give a careful arrangement of the points decided under the several chapters into which the work is divided. This is a very safe plan to pursue, and one which gives a certain value to a book on this subject, though we would gladly welcome a fuller discussion on the various points of doubt and difficulty which arise in insurance cases. Insurance law is known to few, and of these few, fewer still are lawyers. We believe that there are many "insurance men" who are, fortunately for the companies they represent, more familiar with the law on any given insurance case than the professional adviser of the company.

The author puts prominently forward a suggestion which we have heard made before, that it would be advisable for Parliament to establish a standard policy for use by all companies doing business in Canada. Such a provision would be a great advantage in this, that people would by degrees know something of their position in case of a loss. It is inconceivable that at this period of time there should be such general ignorance on the subject of insurance. Insurance companies are not free from blame in this matter; nor is it to be wondered at that there is a general want of sympathy for them when they feel called upon to resist claims on technical grounds, when the insuring public see on every side the efforts that are made by agents to obtain risks without the slightest effort to ascertain the correctness of the statements made to them. The usual course is to require insurers to fill up and sign a partly printed form of application. It would be well for the public to decline this part of the programme in all cases

where it is possible or convenient for an inspection to be made by the Company's agent. It may be, as is alleged on behalf of insurers, that no fair claims for compensation are resisted, and that technical defences are only resorted to when they have a "moral conviction" that the claim is fraudulent. But it cannot be denied that a proper system of inspection would frequently obviate the necessity for a contest. It would very generally operate as a restraint upon the insured, and be a safeguard to the insurer, more creditable and effectual than the usual technical defences to which companies are so often driven by their own carelessness. This matter has more than once been made the subject of judicial comment.

Mr. Clarke's book will find a ready sale among mercantile men and insurance officers, as well as amongst the legal profession.

American Law Review—October, 1873. Boston: Little, Brown & Co.

The subject of an Elective Judiciary is again taken up. The writer thus concludes his observations:

"It is seldom that a man or community consents voluntarily to surrender the immediate exercise of any accustomed power. Even its delegation to agents requires a considerable exertion of moderation and self-restraint. If the people of New York shall deliberately resign the power of electing their judges, and deliberately return to the ways of ancient wisdom, they will, in our opinion, evince a high degree of political intelligence, and furnish to the world a striking proof of their fitness for self-government, and their capacity to profit by the lessons of experience."

This is instructive to those who scorn the old paths, and is some evidence of a healthy re-action in a most important matter.

The distribution of the Geneva award occupies a number of pages, and is an appeal for the fair division of these ill-gotten gains. "Easy come, easy go—" We wish them joy of the whole business, and hope this is about the last we shall ever hear of it, though this may be doubted.

There is a long and learned article on the law of homicide, speaking especially as to the presumption of malice, and, after a careful review, the writer lays it down that the presumption of malice from the fact of killing, and *a fortiori* from the fact of intentional killing, has been so firmly established by the common law from the earliest period that, if it is thought conducive to change the rule, resort must be had to the Legislature.

There is a further addition to the criticisms on the reporters and text writers, which we have from time to time reproduced, and to a certain extent supplemented.

CORRESPONDENCE.

Law Society—Primary Examinations.

To the Editor of the Canada Law Journal.

Dear Sir,—I wish to lay before you what is in my case (and may be in many others) the harshness of the present examinations for admittance to the Law Society; and especially as of late, when the examinations have been made much more severe than they were (which I do not say was not necessary), for the purpose of decreasing the number of candidates of the quality that were presenting themselves. As you are aware, the books have been increased by the addition of Cæsar, Cicero, Virgil, and with that a much more searching examination. Now the writer, when at school, did not think that he would ever study law, so that the dead languages were, I may say, put aside (excepting the Latin grammar), and devoted his time to French (about four years), Euclid, algebra, and the commoner studies. Now, it may be that my scholastic education is quite as good as many of those who have been fortunate enough to have studied Latin instead of French, thereby being enabled to pass the present examination. Now, sir, it is indeed hard that I should be compelled to devote my time to the study of these works when I should be reading for my "intermediates." During the time of the Edwards of England, French was the language wholly used in courts, and quoted in many text books. I think it should be optional (as it was a few years past—if the candidate chose, he could be examined in Sallust or Horace); and it should be now Telemachus, Charles the Twelfth, or Horace, &c. Do you think that, on application to the proper parties, they would consider my case, and allow an examination in French in lieu of Latin?

Respectfully yours,

An Articled Clerk.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 36th Victoria.

DURING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law. (The names are given as on the roll, and not in order of merit.)

No. 1257. Charles Victor Warmoll.
R. H. Caddy.
Hugh Matheson.
Harry Vincent.
James Reeve.
Michael Brennan.
Samuel Platt.
William Macdiarmid.
Robert Baldwin Carman.
C. R. W. Biggar.
George A. Mackenzie.

No. 1263. James Stafford Kirkpatrick.

Admitted and Called.

No. 1269. Henry J. Morgan.

And the following gentlemen received Certificates of fitness:

Charles R. W. Biggar.
J. B. McArthur.
Hugh Matheson.
Alexander Dunbar.
George A. Mackenzie.
Michael Brennan.
James Stafford Kirkpatrick.
D. G. Macdonell.
R. H. Dennistoun.
John McMillan.
C. Bogart.

And on Tuesday, the 20th May, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Hamilton Cassels.
John W. Burnham.

Junior Class.

Rolland A. Macdonald.
Donald M. Christie.
G. Wallace Bain.
W. John Mulholland.
J. Clarke Eccles.
A. McD. Knight.
Franklin J. Brown.
Ethelwolf Scatcherd.
Hugh Stewart.
William Lawrence.
M. G. Cameron.

Articled Clerk.

Alfred Wright.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the [illegible] fees, and presenting to Convocation [illegible] certificate of his having received

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. 1, Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shal be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 42.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY FOR DECEMBER.

1. Mon.. Clks. (ex. Co. Clks.) ret. res. Ratep. P. T. P. D. Q. B. N. T. D. C. P.
2. Tues.. Last day for not. of trial Co. Ct. N. T. D., Q. B. P. D., C. P.
3. Wed.. Con. Stats. came into force, 1859. Op. D., Q. B. N. N. D., C. P.
4. Thurs. Re-hear. Term in Chy. begins. Op. D., Q. B. Op. D., C. P.
5. Fri. .. Last day but one take out Cer. N. T. D., Q. B. Op. D., C. P.
6. Sat. .. Mich. Term ends. Last day for Art. Clks. and Students to give notice. Open Day, Q. B. Open Day, C. P.
7. SUN.. *2nd Sunday in Advent.*
9. Tues,. Gen. Sessions and Co. Court Sittings in each Co. begin.
14. SUN.. *3rd Sunday in Advent.* Prince Albert died, 1861.
15. Mon.. Collectors to return Rolls to Treasurers, and pay over money unless time extended.
21. SUN.. *4th Sunday in Advent.* Shortest day.
22. Mon.. Nomination of Mayors, Aldermen, Reeves, Councillors, and Police Trustees.
25. Thurs. *Christmas.* Christmas Vacation in Chancery begins.
26. Fri. .. *St. Stephen.* Upper Canada erected into a Province, 1791.
27. Sat. .. *St. John.*
28. SUN.. *1st Sunday after Christmas.*

CONTENTS.

EDITORIALS:

The Recent English Bench Vacancies 333
The "Social Evil" Law in St. Louis..... 333
"Mingle Mangle" 333
Following the English Law..... 334
A Mischievous Example to Judges 334
Difficulties in Interpreting Wills 334
Law Society—Michaelmas Term, 1873..... 334
The Administration of Justice Act, 1873..... 335
Administration of Justice in Toronto 338
The Reporters and Text Writers 339

SELECTIONS:

Vice-Chancellor Wickens 344
Dumpor's Case. 345
Communications between Solicitor and Client .. 359
Suing upon the Advertisement of an Auction .. 360
Lord Selborne on Trial by Jury..... 361

CANADA REPORTS:

Ontario:

Notes of Recent Decisions:

Common Pleas..... 361
Chancery Chambers 363

REVIEWS:

The Canadian Monthly and National Review.... 363

LAW SOCIETY OF UPPER CANADA..... 364

THE

Canada Law Journal.

Toronto, December, 1873.

Two vacancies have recently occurred in the English Bench by the death of Vice-Chancellor Wickens on the 23d October, and since then by the death of Chief Justice Bovill. The Attorney General, Sir John Duke Coleridge, is to take the place of the latter; and it is said that Mr. Charles Hall, a stuff gownsman, will be elevated to the Bench as a successor to the V. C.

By a recent decision of the St. Louis Court of Criminal Correction, it has been held that the ordinance of that city regulating what is commonly called "the social evil" (which is based upon an act of the legislature giving special extraordinary municipal powers), is illegal and void, on the ground of its being an infringement of the Constitution, and contrary to the spirit of the Bill of Rights, in operating, as it does, against one sex.

A very fair example of that motley patch-work of figures which the wits of Queen Elizabeth's day used to call *Soraismus:* Anglice, "mingle-mangle," is to be met with in the opinion of Judge Brockenbrough, presiding at a moot court in Washington and Lee University, and published in the *Southern Law Review.* He very ably discusses an intricate question in the law of dower, but having occasion to refer to the "Fine and Recovery Act" of Virginia, passed in 1776, he cannot resist the temptation to use fine language and so eulogizes the Act thus: "The whole pestilent brood of estates tail fell, as by the touch of Ithuriel's spear, and at one fell swoop, perished in an instant, by the mere operation of law!"

We ventured to express an opinion in a former article, 8 C. L. J., N. S., 207, that, upon the construction of the 44th section of the Common Law Procedure Act, the courts of this Province would probably follow the decisions in the English Queen's Bench, particularly that of *Cherry* v. *Thompson*, in preference to those of the other courts. We notice that this has been done in *McGiverin* v. *James*: 33 U. C. Q. B. 203, where the Chief Justice observes: "I think we should follow the decision of *Cherry* v. *Thompson*, L. R. 7 Q. B., 573, as the most reasonable view to take of the intention of the Legislature in passing the Act, and as being in accordance with decided cases in our own Courts under similar provisions (*i. e.*, as touching the import of the words "cause of action")."

We happen to have by us a scrap cut from the *Law Times* which, though rather old in point of date, is not inappropriate to some few of the county judges on this side of the Atlantic. The superior courts here have occasionally had to remark upon the inconveniences and evils resulting from the practice which is objected to in the following:

"The Judge of the City of London Court is setting a very mischievous example to County Court Judges in refusing to state his reasons when his decision is to be appealed against. If it were likely to be followed we should take some pains to show the unfortunate effect which such a course is calculated to have upon the proceedings in the Court of Appeal. But apart from all questions of expediency, an inferior court declining to state the grounds of its decisions, seems to be a confession of timidity and incapacity. We trust that the observations of the Judge to the Admiralty Court will cause the learned Judge of the latter court to adopt the more convenient plan of delivering judgments."

Vice-Chancellor Bacon has given expression to the long-suffering endurance of judges condemned to ascertain the meaning of the language of testators who had no clear idea themselves of what they meant. In *Re Stevens' Trusts*, L. R. 15 Eq., 110, the judge observes, "this is one of those cases which certainly call, for the enactment of a code, or of some rule for the interpretation of expressions to be found in wills." Some of the older judges had a more summary way of solving the difficulties of testamentary cases. On one occasion counsel said to Sir Richard Arden, Lord Alvanley, when Master of the Rolls, that it was the duty of the court to find out the meaning of the testator. "My duty, sir, to find out his meaning!" exclaimed his Lordship. "Suppose the will had contained only these words, *Fustum fumidos tantaraboo*. Am I to find out the meaning of his gibberish?" But seriously it is much to be desired that some plan were hit upon by the legislature to compel people under penalty of being declared to die intestate, to display some evidence of rationality and intelligibility in the final disposition of their property, and also to lessen the chaos of conflicting decisions upon the interpretation of wills.

LAW SOCIETY—MICHAELMAS TERM, 1873.

The examination of students this Term has scarcely reached the average standard of proficiency—though many of them did very well. Of the eleven candidates who presented themselves for call, six were passed, none, however, receiving the number of marks (three-fourths) required for pass without oral, though the first on the list were very near it; that compliment, however, was paid to them in consideration of their having previously been admitted to practice as attorneys and solicitors. The following is the order in which they passed: R. C. Clute, M. D. Fraser, J. B. McArthur, N. F. Hagle, R. E. Kingsford, C. O. Ermatinger.

Of the attorneys, four passed without

an oral: M. D. Fraser, G. B. Gordon, (both of whom were very creditably near the maximum) H. M. Deroche and C. E. Barber. Five others did a fair amount of pass work, E. H. D. Hall being only a few marks short of the required three-fourths.

For the first intermediate examination twenty-eight presented themselves; of these, eight obtained over three-fourths of the maximum of 300 marks; twelve did enough to pass, and eight were rejected. The names of the first eight are in order as follows: McColl, McConkey, Holman, Killam, Hodgkin, Locke. In the second intermediate, ten obtained over three-fourths of the maximum, their names being, in order of merit: O'Brien, Coyne, Watt, Baines, Parks, Watson, Greig, H. Lennox, Wells, J. T. Lennox. Fourteen did enough to pass and two were rejected.

The Scholarship examinations resulted as follows:—First year. Frank Pepler, 254 marks out of a maximum of 320. For three consecutive years Mr. Pepler has obtained scholarships, on each occasion passing an excellent examination. No other candidate came up to the maximum. Second year:—A. J. McColl, 277 marks; J. W. Gordon, 260 marks; W. MacWhinney, 253 marks; maximum 320. First year:—W. E. Thompson, 276 marks; maximum 320. No other candidate reached the maximum.

The Benchers have lately been busily engaged in the re-arrangement of the old and the preparation of some new Rules, for the management of the affairs of the Society.

An important change is made in the Convocation of Benchers by providing for meetings out of Term, on the last Tuesdays in June and December. A difficulty has been experienced in getting business done in Term time; most of the Benchers being, at that time, busily engaged with Court motions of pressing importance. A few hours of uninterrupted and concentrated work in vacation will see more business accomplished than days of distraction and divided attention during Term.

In the Rules under the head "Examination of Candidates," it is now provided that notice of the intention of every person to apply for admission as a student or articled clerk, must be delivered to the Secretary at least *six weeks* before the Term in which he seeks admission. It has also been provided that the Secretary shall make out two lists containing the names, addresses, and family residence of all the candidates, which are to be posted in his office and in Convocation Chambers. There are also some new rules as to the mode of examination of candidates, which need not be referred to at length.

These Rules will shortly be published in pamphlet form.

THE ADMINISTRATION OF JUSTICE ACT OF 1873.

There is recorded a notable dictum of the first Law Redesdale to the effect that the separation of law and equity has produced a purity in the administration of justice which could not be effected by other means. Of late years, however, in England and Canada, the current of legislative action has set in an entirely opposite direction. This has been chiefly evidenced by partial transfers of equitable jurisdiction to Common law courts, and has culminated in the English Judicature Act of 1873, and the Ontario Act which is placed at the head of this paper. Both of these acts are in truth designed to accomplish, though in different ways, that great desideratum, which is popularly spoken of as "the fusion of law and equity." What is really meant by this phrase is that a suitor who has any rights, legal or equitable, against his opponent may assert those rights in the court with the certainty of getting an adjudication

upon the merits, and that the court once seized of a cause, whether legal or equitable, shall be able to work the matter litigated to its ultimate issues, and to administer appropriate relief to all parties therein. The observation of Horne Tooke upon the charge of Mr. Justice Ashurst is well known. "The law," said that ponderous dignitary in his remarks to the jury, "the law is open to all men, to the poor as well as to the rich." "And so," interpolated the wit, "is the London Tavern." But in many cases the mischief was that the guest in the tavern was better off than the suitor in the courts: the former only paid for what he ordered; the latter, although he failed to get what he sought, had nevertheless to foot the inevitable bills of costs.

The intention of the English Act is to dispose effectually of all civil causes by relegating them at the outset to the appropriate chamber of the Supreme Court. The intention of the Provincial act is to give like relief by transferring (if necessary) the cause at a certain stage to the appropriate forum. We are not sure but that in practice the Ontario Act will be found to work as well as, if not more satisfactorily, than the Imperial Act. The existing state of affairs is less disturbed by the Provincial act, which makes the courts of law and equity to be, as far as possible, auxiliary to one another.

The prominent features of our own Act, to which at present we propose to call attention, are in regard to the changes introduced in equitable pleading, and the great scope which is given to the presiding judge in allowing amendments.

And first, as to amendments. An immense stride was made in furtherance of justice by the 222nd section of the Common Law Procedure Act. By this enactment all defects and errors were amendable whether there was anything in writing to amend by or not; whether the error was that of the party applying to amend or not, and it was further provided that "all such amendments as may "be necessary for the purpose of deter- "mining in the existing suit, the real "question in controversay between the "parties, *shall* be made." By virtue of this section, courts of common law actually outstripped courts of equity in granting amendments, so that we find Chancery judges adverting to this section as a reason for extending their practice in the same direction. Thus in *McGregor* v. *Boulton* 12 Gr. 293, the Court says the inclination is now to allow amendments as fully as is done at Nisi Prius under the Common Law Procedure Act. See also *Frazer* v. *Rodney* 11 Gr. 426.

In the act under consideration, the sections relating to amendments are the 8th, 49th and 50th. The eighth section gives full power to deal with the question of parties, and in this respect does not add to the powers which courts of equity have always exercised, but is intended rather to enlarge the jurisdiction of the Common law courts in this direction. By this section, parties may be added to or struck out of the record; parties plaintiff may be treated as defendants and *vice versa*, and in all such matters the court of law is to dispose of the same as fully as a court of equity could do.

In regard to an objection for want of parties, the practice in equity is as follows: If the defect appears on the plaintiff's pleading, the defendant may demur on that ground, and, if successful, the demurrer will be allowed with costs. If the objection is not apparent on the face of the plaintiff's pleading, the defendant may raise the objection by his answer, (indicating by name or otherwise the parties who should be added), and if at the hearing the objection is found to prevail, the court will order the cause to stand over, in order that the record may be amended by the addition of parties, and will give the defendant the costs of

the day: *Totten* v. *Douglas*, 15 Gr. 128, 133. If the objection is not taken by the answer, the court will usually give no costs of the day to either side, although it may order the cause to stand over, that the parties may be added.

By the 49th and 50th sections, no formal objection is to defeat any proceeding, but the court is to make such amendments as shall secure the giving of judgment, according to the very right and justice of the case. The court may also, of its own motion, direct all such amendments to be made as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the parties, and of the real question in controversy between them.

Next in regard to equitable pleadings. The amendments of the law are mainly two-fold:—In enlarging the scope of equitable defences in personal actions; and in extending the right to plead equitably to actions of ejectment. We may here draw attention to some observations on the subject of equitable pleading in the last volume of this journal (vol. viii. p. 131), copied from the *Law Magazine*. The case of *Shier* v. *Shier*, 22 C.P. 147, is also instructive upon the point as to the limits within which it was allowed to plead equitably at that time. In that case, Mr. Justice Gwynne, in a very able judgment, in which he dissented from the majority of the court, observed, "It is, I think, much to be regretted, that the courts of law have, as I think they have, taken too limited a view of what the intention of the Legislature was in allowing equitable defences to be pleaded to actions at Common law." In the present Act, the Legislature have interposed to relieve the courts from their self-imposed limitations in regard to equitable pleading. It is now expressly provided, by section 3, that the pleader at Common law may set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle the party to an absolute, perpetual and unconditional injunction in a court of equity, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts.

The provisions of the Act with respect to equitable defences in ejectment are a step in the right direction. The Judicature Commissioners of 1871 in England recommended that there should be an extension of the right to plead equitably to actions of ejectment. Soon after the passage of the Common Law Procedure Act of 1854, whereby equitable pleas at law were first introduced, the question arose as to how this affected actions of ejectment. In *Neave* v. *Avery*, 16 C. B. 328, the defendant set up a defence on equitable grounds, to which the plaintiff demurred, for that equitable pleas were altogether inadmissible in such actions. The Court held that an equitable defence was not available in an action of ejectment, and this was put mainly upon the ground that there could be no "*plea*" in ejectment; and as no legal defence could be *pleaded*, *à fortiori* no equitable defence could be spread upon the record. They held also that the proper way of getting rid of such defence was not by demurrer, but by a summary application to strike it out.

It is noticeable that in the report of *Neave* v. *Avery*, in 3 Com. L. Rep., p. 914, Mr. Justice Crowder is reported as saying, during the argument, in reference to section 83 of the Act allowing defences on equitable grounds: "The expression in the clause is '*any cause;*' that is as general as possible, and my present impression is, that the action of ejectment comes within it."

However, the decision of the court in this case defined the rule of practice upon the statute, and has been

observed in the Courts of this Province. Sections 4 to 7 of the present bill cut away the technical ground upon which the decision in *Neave* v. *Avery* rests, and give affirmatively the right to set forth by way of equitable plea the facts which entitle the defendant on equitable grounds to retain the possession, and they give the plaintiff the right to reply thereto on equitable grounds,—and as a consequence the right to demur to such defence and replication is also given in express terms.

In Ireland, the course of practice has been quite opposed to the rule laid down in *Neave* v. *Avery*. There it was held that as the defendant could set up a legal defence by way of plea in ejectment, he might do the same in respect of an equitable defence by virtue of the provisions of the Common Law Procedure Act of 1856, applicable to Ireland: *Turner* v. *McAuley*, 6 Ir. Com. Law Rep., 245 (1856). It was also held in the same case that the proper way of raising objections to the validity of such plea was by demurrer. Since then equitable defences have been pleaded in Ireland in actions of ejectment, with such restrictions only as the judges (following the English authorities) have chosen to impose upon themselves in requiring the facts to be such that an absolute and unconditional injunction might be obtained thereon in a Court of Equity: *Cochrane* v. *Canack*, 7 Ir. Com. Law Rep., 10; *Deering* v. *Lawler*, *ib.* 333. As we have above remarked, the provisions of the present Act release the Courts from their self-imposed fetters in this respect, and restore them to that freedom of action which we are persuaded was intended when the legislature first gave the right to plead equitable defences in common law suits.

It is, of course, to be observed that there may be cases of equitable pleas and replications in ejectment which could be objected to under the 119th section of the Common Law Procedure Act (C. S. U. C., cap. 22), as tending to embarrass or delay. The application under this section is not by way of demurrer, but upon motion to have the objectionable plea reformed or set aside. A similar practice obtains in Ireland as to these equitable pleas: *Clarke* v. *Reilly*, Ir. R., 2 C. L., 422.

ADMINISTRATION OF JUSTICE IN TORONTO.

There has been a rather remarkable block in the civil business at the recent Assizes for the County of York. The Court sat for one month, during which period some forty indictments were tried, twenty-eight civil causes disposed of, and eighty-two records made remanets.

It is difficult to estimate the annoyance, inconvenience, loss of time, loss of money and possible loss of property which is represented by this delay in business; it must necessarily be very great.

The difficulty is not, however, likely to occur again, at least for some time to come. The wisdom of some of the provisions of the Act for the administration of justice which affect this question are now fully apparent. The additional sittings of the County Court and General Sessions of the Peace in the County of York will dispose of much of the business which would otherwise (as has been the case this year) come before the Judge of Assize. The same remark is applicable, though to a limited extent, to the additional assize provided for the County of York between Easter Term and the first of July—we say to a limited extent—for the time during which that Court can sit will generally be very short. This Assize is also subject to the great objection of sitting at a period of the year during which it

will be very inconvenient for the farming community who compose the majority of the suitors, witnesses and jurors to attend. These objections are so strong that it may be questioned whether it would not be better to dispense with it altogether, and have more time devoted to the Winter Assizes, and if necessary shove on Hilary Term a week. The force of this suggestion is increased when we refer to the provisions of sec. 54 of the Act, which provides that the Courts of Assize and Nisi Prius may be held separate and apart from the Court of Oyer and Terminer and General Gaol Delivery "either on the same or a different day." This is a very valuable provision and marks an era in the annals of judicial administration.

The old plan of mixing up civil and criminal business was well enough when the amount of business was limited, and is still necessary in outside counties; but the time, has come for the sitting of distinct courts in the City of Toronto. We apprehend the plan adopted will be to have the sittings of the different courts at different times. It would be better not to have both going on at the same time, if it could be avoided, though this is the practice in England. The sitting of the criminal court might be for two weeks and then be closed. Then the civil court with a different panel of jurors would follow, and last for two or three weeks.

We think we may hazard another suggestion, and that is that the Grand Jury should be summoned a few days earlier than the Petit Jury for the criminal sittings, so as to get the work ready for the latter and thus effect a further saving of time.

THE REPORTERS AND TEXT WRITERS.

We continue this interesting collection, made for the *American Law Review* by some industrious student of the reports:

American Authorities, English estimate of. —"The American authorities are not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reason they give for their opinions."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 92.

Bacon's Abridgment. "A sufficient authority."—Blackburn, J., in *The Queen* v. *Ritson*, L. R. 1 C. C. 204.

See Comyns's Digest.

Bentham's Rationale of Judicial Evidence. "The general principles of evidence are ably discussed, and often happily illustrated. That book should, however, be read with caution, as it embodies several essentially mistaken views, relative to the nature of *judicial* evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence." —Preface to Best on Evidence.

Best on Evidence. "A very able and instructive treatise on the principles of evidence." Mr. Justice Willes in *Cooper* v. *Slade*, 6 House of Lords Cases, 772.

Blackstone's (Sir William) Reports. "We must not always rely on the words of reports, though under great names: Mr. Justice Blackstone's reports are not very accurate." —Lord Mansfield in *Hassells* v. *Simpson*, 1 Dougl. 93, 4th ed.

Bonnier (E.). Traite Theorique et Pratique des Preuves en droit civil et en droit criminel. 8vo. Paris, 1843. "An able work."—Preface to Best on Evidence. Although the third edition of this excellent book was published as recently as 1862, still it is now scarce. A faithful translation would be of the greatest possible value to the profession.

Callis's Reading upon the Statute of Sewers. "One of the best performances on that subject, and which has always been admitted as good authority."—Buller, J., in *Dore* v. *Gray*, 2 T. R. 365.

"The course of legal education, at the Inns of Court, consisted principally of readings and mootings, which have been described by Dug-

dale, Stow, and other writers. In times when the works of the learned existed only in manuscript, and guarded in libraries with jealous care, were not easily accessible to the student, the necessity of oral instruction by such exercises is obvious. The readings delivered in the hall with great solemnity by men experienced in the profession, were expositions of some important statute or section of a statute. Many of them have been published, and some of these contain most profound juridical arguments, such for instance as Lord Bacon's Reading on the Statute of Uses, and that of Mr. Serjeant Callis on the Statute of Sewers. These readings being attended with costly entertainments, their original object was forgotten in the splendor of the tables, and it became the duty of the reader rather to feast the nobility and gentry than to give instruction in the principles of the law. From this cause they were eventually suspended."—Spilsbury's Lincoln's Inn, p. 18.

CARTHEW'S REPORTS. In *The King* v. *Heaven*, 2 T. R. 776, Lord Kenyon, C. J., observed that Carthew "in general is a good reporter." And Chief Justice Willes, a first-class authority in matters of this kind, in distinguishing the reports of a case "more largely and particularly reported" in 5 Modern than in Carthew, said: "I own that Carthew is in general a very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think that the court would give so absurd a reason for their judgment, especially since there is not a word said of it in 5 Modern, where the case and the arguments upon it are very particularly reported."—*Tapner* v. *Merlott*, Willes, 181. The citation of cases from Carthew in such books as Mr. Serjeant Williams's Notes to Saunder's Reports, and Mr. Serjeant Stephen's Treatise on Pleading, certainly argues well for the reputation of the reporter, who, according to a recent writer, "arrived at an eminence which, but for his early decease, would have secured for him a seat on the judicial bench.—Woolrych, Lives of the Serjeants, vol. ii. p. 460. At p. 462 he continues: "But during the trial of the Bishop of London against Fytche, in the House of Lords, Lord Thurlow observed, that Carthew and Comberbach were equally bad authority. However, with regard to this hostile opinion of Lord Thurlow, there is a curious tradition in the Carthew family, that the Serjeant's grandson headed an adverse party against the Chancellor at school upon one occasion (for they were school fellows), and that Thurlow was a great bully, and remembered the circumstances afterwards with an ungenerous feeling."

CASAREGIS (JOSEPHUS LAURENTIUS MARIA DE). Discursus Legales de Commercio; et Elucubrationes ac Resolutiones in aliquot, et ad integra Statuta de Decretis, ac de Successionibus ab Intestato Reipublicæ Genuensis. Editio secunda. 4 vols in 1, fol. Venetiis, 1740.

"The highest authority."—Shee, J., in *Kemp* v. *Halliday*, 6 Best & Smith, 736. Casaregis was for more than twenty years a judge in Florence. He taught as a professor of law, and his writings enjoy the highest reputation in Europe as standard authorities in mercantile affairs. Valin affirms that he is beyond all contradiction the best of all maritime authors.

CLAYTON'S REPORTS. This is a very thin 12mo, containing in the body of the book 158 pages, published in 1651. "If this book," writes Mr. Allibone, "will do all that Mr. Clayton promises for it, we should suppose that our friends the lawyers would insist on its immediate republication. In "The Epistle to the Fair Pleader," the reporter says: "You may see here how to avoid a dangerous jury to your client, what evidence best to use for him, how to keep the judge so he overrule you not; so that, if it be not your own fault,—as too often it is for fear or favor,—the client may have his cause so handled as, if he be plaintiff, he may have his right, and if defendant, moderately punished, or recompensed for his vexation; and such pleaders the people need."

COKE'S REPORTS. See PLOWDEN'S COMMENTARIES.

COKE'S THIRD INSTITUTE. HALE'S HISTORY OF THE PLEAS OF THE CROWN. "In the course of the seventeenth century two remarkable works on the criminal law were written, which not only gave an authentic view of it as it stood in the earlier and later parts of the century, but are still regarded as books of the highest authority. Coke's Third Institute is like the rest of its author's works, altogether unsystematic. It is little more than a digest, showing incidentally the progress made by the law since it was first reduced to shape.

"Hale's History of the Pleas of the Crown differs widely from Coke's Third Institute in point of style and composition, and handles systematically several subjects which Coke touches upon in a fragmentary and occasional

manner. Some, but few, additions were made to the body of the criminal law between the dates of the two works; but in the main the law continued, as it was, a system strangely antiquated, unsystematic, and meagre, but of reasonable dimensions, and apparently sufficient for practical purposes."—Stephen's General View of the Criminal Law of England, pp. 65, 66.

Comyns's Digest. Coke's Institutes. Bacon's Abridgment. Tidd's Practice. "Text books of the highest reputation."—Kelly, C. B., in *The Queen* v. *Ritson*, L. R. 1 C. C. 203.

Comyns's Digest. "This dictum, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron Comyns."—Sir William Scott, in *The Gratitudine*, 3 Chr. Rob. 269.

Cooke's Reports "Sir George Cooke's Reports (long out of print and scarce) have always been held in good repute, and frequently cited.

"In 3 Wilson, 184, Serjeant Jephson, citing the case of *Palmer* v. *Sir J. Edwards*, says, 'See the case at length, for it seems well reported by that very able chief prothonotary of the C. B.'

"We were induced to select Cooke's Reports as the next volume in our series of reprints, by having become possessed of a copy formerly belonging to Mr. Justice Nares, and containing numerous MS. notes. These notes appear to be partly his own, and partly copied from notes made by Chief Justice Eyre. The authenticity of these notes is confirmed by an observation of Nares, J., in the case of *Crossley* v. *Shaw*, 2 W. Bl. 1088."—Publishers' advertisement to the 3d ed.

Cripp's Law of the Church. Cockburn, C. J.: "I have had occasion lately to consult that book, and was much struck with the ability and research displayed in it."—*Griffin* v. *Dighton*, 5 Best & Smith, 100.

Dane's Abridgment. "Mr. Dane may be considered as a lawyer of the old school, who had devoted many years of his life to the study and exposition of the laws of Massachusetts."—Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 73.

Dyer's Reports. See Plowden's Commentaries.

East's Pleas of the Crown. "A work of good authority.—Shaw, C. J., in *Commonwealth* v. *Webster*, 5 Cush. 306.

Eldon (Lord), and his Reporters. "His later reporters were very able men, and if they had felt themselves at liberty to methodize and condense,—accurately preserving the substance and the spirit of the original,—they would have done much more justice to him, and conferred a much greater benefit on the public; but I have been told that he highly disapproved of any proposal for reporting him on this plan, and that he was best pleased when he saw himself in the transcript of a short-hand writer. None of his biographers have ventured on giving an entire judgment as delivered by him."—Lord Campbell, Lives of the Chancellors, vol. x. p. 241, 5th ed.

Election Cases, Reports of. See Elliott on Registration.

Ellenborough (Lord). "Great is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 96.

Elliott on Registration. Second edition. When the decisions of committees of the House of Commons on elections, collected in this book, were cited in the course of the argument in *Whithorn* v. *Thomas*, 7 Man. & Grang. 4, Tindal, C. J., said that, so far as the reasoning in these cases went, it might be proper to cite them, but not as authorities.

Fitzherbert. The New Natura Brevium, by Sir Anthony Fitzherbert. This work, on the nature of writs, is "of the greatest authority."—*Kettle* v. *Bromsall*, Willes, 120. It was first printed in French, in 1534, 8vo, and has been frequently reprinted. The last edition was in 1794, two vols. 8vo, in English. The author was a judge of the Court of Common Pleas in the reign of Henry VIII.

Foster's Crown Law. "An authority of the highest character."—Shaw, C. J. in *Commonwealth* v. *Roby*, 12 Pick. 509. "Sir Michael Foster was an eminent judge of the highest court of criminal jurisdiction, many years before our Revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating and exact writer, whose chapter on the law of homicide has been a work of standard authority on that subject for a century."—Shaw, C. J., in *Commonwealth* v. *York*, 9 Met. 111. "An eminent judge and a learned writer on criminal law."—Wilde, J., 9 Met. 132. Lord Chief Justice DeGrey speaks of him as one "who may be truly called the *magna charta* of liberty of persons, as well as fortunes."—3 Wils. 203, quoted 9 Met. 111.

THE REPORTERS AND TEXT WRITERS.

GALE ON EASEMENTS. Third edition, edited by W. H. Willes, Esq. 1862. "A valuable edition."—Williams, J., in *Bamford* v. *Turnley*, 3 Best & Smith, 75.

GILBERT ON EVIDENCE. This work is commended in very high terms by Blackstone, who says it is impossible to abstract or abridge so excellent a treatise, without losing some beauty, and destroying the chain of the whole.—Comm. vol. iii. ch. 23. "To Lord Chief Baron Gilbert principally we are indebted for reducing our law of evidence into a system,"—Best Ev. § 87, 5th ed.

GLANVILLE. Ranulph de Granville is the reputed author of this treatise. The publication of the Fines by the Record Commission in 1835 has cast some additional doubt as to this authorship. See Preface to Book of Fines, p. 16.—Rawle on Covenants, p. 13 note, 4th ed.

GRAVES (CHARLES SPRENGEL, ESQ., Q. C.) "The editor of Russell on Crimes is known as a gentleman of great learning, ability, and research."—Pollock, C. B., in *Regina* v. *Curgerwen*, L. R. 1 C. C. 3. "I have the highest respect for the learning of that excellent writer."—Talfourd, J., in *Regina* v. *Bird*, 2 Denison C. C. 149.

HALE DE JURE MARIS. "The acknowledged authority upon this subject."—Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 90.

HALE'S PLEAS OF THE CROWN. See COKE'S THIRD INSTITUTE.

HARDRES'S REPORTS. "The knight was of some note in this day as a lawyer, a reporter, and a man of rank.—Woolrych, Lives of Eminent Serjeants, vol. i. p. 400. In Wallace's Reporters, p. 201, it is said, with great truth, that "this volume contains some of the most learnedly argued of the old reports."

HAWKINS (MR. SERJEANT). "A very learned, painstaking man."—Best Ev. § 134.

HOLROYD (MR. JUSTICE). "One of the most accurate lawyers and profound thinkers that ever sat on the bench."—Lord Denman, C. J., in *Doe* v. *Suckermore*, 5 Ad. & El. 747. "Than whom a more sound and safe authority cannot be quoted."—Williams, J. ib., at pp. 725, 727.

JACOB'S LAW DICTIONARY. "The authority of this book must not be too implicitly relied on."—Lord Chief Justice Reeve. Instructions for the study of the Law, in Collectanea Juridica, vol. i. p. 79.

JOY ON PEREMPTORY CHALLENGE OF JURORS. "A very learned book."—Parke, B, in *Gray* v. *The Queen*, 11 Clark & Finnelly, 473.

LITTLETON ON TENURES. "A work of higher authority than any other in the law of England."—Lord Campbell, Lives of the Chancellors, vol. i. p. 342, 5th ed.

MEESON AND WELSBY'S REPORTS. In the course of the argument in *Cope* v. *Barber*, L. R. 7 C. P. 404, note, Mr. Justice Willes desired to correct an error in the report of *Worth* v. *Terrington*, 13 M. & W. 781, 795, in which a certain observation was attributed to Baron Parke. He said that he had in his possession a letter from Lord Wensleydale, in which that learned judge declared that he had never made the observation imputed to him. Later in the day, Lord Wensleydale's copy of thirteenth Meeson and Welsby was handed up to the bench; in the margin of the report of the case above referred to were these words, in his Lordship's own handwriting,—"I never said so."

MOLLOY. Of this author, Sir William Scott thus writes: "Of Molloy I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.—*The Gratitudine*, 3 Chr. Rob. 269.

MODERN REPORTS, VOL. V. "This must be the mistake of the reporter, for Lord Holt could not say so absurd a thing."—Lord C. J. Willes in *Morse* v. *James*, Willes, 127.

MOODY AND ROBINSON'S REPORTS. These volumes are worthy the attention of the profession, "on account of the brevity and accuracy with which the decisions are given, and the useful notes subjoined to those cases which are of superior interest and importance."—Warren's Law Studies, 931, 2d ed.

MOOR (SIR FRANCIS) REPORTS. "Moor's Reports are a posthumous work, incorrect notes taken for his own use, not intended to be published.—Lord Macclesfield, State Trials, vol. vi. p. 230.

MOOR (SIR FRANCIS) REPORTS. "A collection of Law Cases," printed in 1663, from the original in French, then in the hands of Sir Geoffry Palmer, Attorney-General to Charles the Second, "which is the same, as I take it," says Wood, "written fairly with the author's own hand, in folio, that was lately in the library of Arth. E. of Anglesey."—Athenæ Oxonienses, ed. Bliss, vol. ii. p. 305, quoted in Woolrych's Lives of Eminent Serjeants, vol. i. p. 230.

The Reporters and Text Writers.

Oughton (Thomas). Ordo Judiciorum. 2 vols. 4to. London, 1728, 1738. "Oughton's work was published in 1728, and, I apprehend, is considered to have faithfully represented the practice then prevailing."—Coleridge, J., in *Doe* v. *Suckermore*, 5 Ad. & El. 708.

Parke (Baron). "One of the most distinguished judges who ever sat in Westminster Hall."—Kelly, C. B., in the Exchequer Chamber, in *Brinsmead* v. *Harrison*, L. R. 7 C. P. 553.

Place (Mr.) "Lord Kenyon observed that the authority of Mr. Place was equal to that of Lord Raymond; that he was reputed to be the author of Watson's Clergyman's Law, and was considered as a lawyer of great eminence.—*Brown* v. *Compton*, 8 T. R. 430, note. "Mr. Place's notes are in general very accurate."—Grose, J., at p. 432.

See Watson's Clergyman's Law.

Plowden's Commentaries. Dyer's Reports. Coke's Reports. "Contain masterly judicial reasoning, and satisfactorily settle the most important questions which have ever arisen in the history of the common law of England."—Lives of the Chancellors, vol. ii. p. 344, 5th ed.

Rastell's Entries. "There are as many faults as lines."—By the Court in *George* v. *Lawley*, Skinner, 392.

Raymond (Lord). See Place (Mr.)

Ryley's Pleadings. This work is recommended to the professors of the law by Lord Chancellor Nottingham.—Clarke's Bibliotheca Legum.

Salkeld's Reports. "As a reporter, Serjeant Salkeld was, in that day, unrivalled. Few have equalled him at any time in the skill required for that purpose. His reports possess great merit, as being for the most part the judgments of Lord Chief Justice Holt."—Woolrych, Lives of Eminent Serjeants, vol. ii. pp. 488, 495. In the Preface to Cases Temp. Holt, it is said: "The method observed in Salkeld's Reports has had the general approbation, therefore is imitated in this collection."

Salkeld's Reports, Vol. III. In *The King* v. *Higgins*, 2 East, 8, note, Lord Kenyon observed "that the authority of the third part of Salkeld was not to be relied on, unless corroborated by other books; and it has been often denied by Mr. Justice Foster."

Saunder's Reports. In *Bissex* v. *Bissex*, 8 Burr. 1729, the court rejected a case as reported in Siderfin, and adopted the same case as reported in Saunders, observing that Saunders was much the most accurate reporter of his time.—1 Saund. 170, 6th ed.; 1 Wms. Notes to Saund. 171.

Schoales and Lefroy's Reports. "Learned reporters."—Selwyn's Nisi Prius, 1185, note, 11th ed.

Selwyn's Nisi Prius. The note on the action of replevin in the edition edited by Henry Wheaton was written by Hon. Theron Metcalf.—See The American Law Review, vol. vii. p. 364.

Sheppard's Touchstone. "Doddridge, now confessedly its author."—Preface to Preston's ed. Lord Truro in *Egerton* v. *Lord Brownlow*, 18 Jur. 100. "A most excellent book."—Chief Justice Willes in *Roe* v. *Tranmer*, 2 Wils. 78. And in *Doe* v. *Salkeld*, Willes, 676, the same distinguished judge, in citing the book, says "Mr. Sheppard, or whoever was the author of that book," &c.

Skinner's Reports. "Are still highly esteemed."—Woolrych, Lives of Eminent Serjeant's, vol. ii. p. 523 (1669).

Smith on Master and Servant. "An excellent work."—Bramwell, B., in *Osborn* v. *Gillett*, L. R. 8 Exch. 99.

Staunford's Book on Prerogative (as well as his Treatise on Pleas of the Crown, which is sometimes cited in the text of Lord Coke's Reports) is a work of considerable authority. I cite it as evidence of what, in his time, was the opinion of the profession on this subject."—Pigot, C. B., in *The Queen* v. *Toole*, Irish Rep. 2 C. L. 40.

Stephanus (Robertus). Thesaurus. "Is a book of the best authority."—Lord Hardwicke in *Rex* v. *Francis*, Cunningham, 286, 3d ed.

Tidd's Practice. See Comyns's Digest.

Terms de la Ley. The first edition was printed in 1563. In 1616, Lord Bacon wrote, "For the books of the Terms of the Law, there is a poor one; but I wish a diligent one, wherein should be comprised not only the exposition of the terms of the law, but of the words of all ancient records and precedents."—*Proposition touching Amendment of Laws.* Life and Letters, vol. vi. p. 70, ed. Spedding.

Townesend (George). Tables to most of the printed Presidents of Pleadings, Writs, and Retorn of Writs, at the Common Law. Fol. London, 1667. "A book of very good authority."—Willes, L. C. J., in *Kettle* v. *Bromsall*, Willes, 120.

Twisden (Mr. Justice). "A very great lawyer."—Mr. Serjeant Williams in note to *Benson* v. *Welby*, 2 Saund. 155 *a*, 6th ed ; 2 Wms. Notes to Saund. 454.

Watson's Clergyman's Law, or Complete Incumbent. "The Complete Incumbent was not written by Watson, but by Mr. Place, of York."—Denison, J., in 1 Burr. 307. "Mr. Place, of Gray's Inn, was the true author."—*Wolferstan* v. *The Bishop of Lincoln*, 2 Wils. 195. The work is recommended by Blackstone, 1 Comm. ch. 11.

SELECTIONS.

VICE-CHANCELLOR WICKENS.

The late Vice-Chancellor Sir John Wickens, who died on the 23rd Oct., at his residence, Chilgrove, near Chichester, in the fifty-ninth year of his age, was the second son of the late James Stephen Wickens, Esq., solicitor, of Chandos street, Cavendish-square, London, by Anne Goodenough, daughter of John Hayter, Esq., of Winterbourne Stoke, Wilts, and sister of the Right Hon. Sir William Goodenough Hayter, of Southhill Park, Berks. He was born in the year 1815, and was educated under Dr. Keate at Eton, where he obtained the Newcastle Scholarship, and soon afterwards he was elected to an open scholarship at Balliol College, Oxford, then in the height of its first successes under the late Dr. Jenkins, afterwards Dean of Wells. At Oxford he closed his undergraduate career, during which he obtained, among other distinctions, the Newdigate Prize for English Verse, by taking his Bachelor's degree in Michaelmas Term 1836, as a "double first class." He did not, however, obtain the much coveted honour of a Balliol Fellowship, as his facetious propensities had shown themselves in several practical jokes against the master and tutors of his college, which appeared to them to render it extremely doubtful whether he would ever settle down into a staid, sober, and demure "Don," such as they who congregated in the Balliol Common Room. He afterwards settled in London to study for the Bar, and in Easter Term, 1840, he was called by the Honourable Society of Lincoln's-inn, and in a short time obtained a considerable practice. His reputation as an equity draftsman while at the Bar was very great, and he was believed to possess a most accurate acquaintance with the science of Chancery pleading, which, as most of our readers know, is a branch of knowledge not now much cultivated. In 1868 he was appointed to succeed the present Lord Justice James, who was then made a Vice-Chancellor of England, as Vice-Chancellor of the Duchy of Lancaster, a position which has often proved a stepping stone to the bench of the High Court of Chancery. Mr. Wickens held at the same time another office which is now looked upon as giving its occupant a still greater claim to a judgeship. He acted for some time as what is called the Attorney-General's "Devil" in Equity. In April, 1871, the deceased judge succeeded Sir John Stuart, on his resignation, as one of the Vice-Chancellors of England. The career of Sir John Wickens on the judicial bench, though so short, was sufficient to show that he possessed the very highest qualities which can be looked for in an equity judge. Indeed, he had showed himself to be abundantly endowed with these even when practising at the Bar. There was always something fair and judicial in his arguments as an advocate. In his judicial capacity Sir John Wickens was called upon to deal with a number of difficult cases, including in particular, many which involved the construction of wills, and very few of his decisions were called in question with success. His name is perhaps best known to the public as the judge who decided the case of *Aylesford* v. *Morris*, which at the time was very much canvassed in all quarters. Vice-Chancellor Wickens, it will be remembered, relieved the Earl of Aylesford from a bargain by which he had agreed to pay within six months of his attaining his majority interest at the rate of sixty per cent. for a loan of money, and the Vice-Chancellor's decision was in March last upheld on appeal by the Lord Chancellor and the Lords Justices. He was a stuff gownsman down to his elevation to the Bench, an appointment which he held for many years as Equity Junior to the Attorney-General being incompatible with his taking silk, and he never aspired to a seat in Parliament. "Sir John Wickens," says a contemporary, "was one of those men whose elevation did not place a distance between himself

and his contemporaries at the Bar. He was always easy and unaffected in his manners, both in and out of court, and even since his elevation to the Bench the Vice-Chancellor walking away from his court with his cigar in his lips was not an unfamiliar figure in the precincts of Lincoln's Inn." The late Vice-Chancellor Wickens married, in 1845, Harriet Francis, daughter of William Davey, Esq., of Cowley House, Gloucestershire, by whom he leaves a family to lament his loss.—*The Law Times.*

DUMPOR'S CASE.

A new commentary on *Dumpor's Case* and the law of conditions of forfeiture, in view of the elaborate and careful annotation thereon in Smith's Leading Cases, might seem at first a work of supererogation. It is nevertheless true that while the essays in question were exceedingly full and well considered upon various derivative topics, arising in the consideration of the general law of conditions, the soundness of the decision itself was hardly referred to, and the extent to which it was either justified by the state of the law when it was pronounced, or has been since confirmed by adjudication or clear authority, was passed by as a matter too well settled for discussion. "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land," says Lord Eldon, in 1807.* "The profession have always wondered at *Dumpor's Case*, but it has been law for so many centuries that we cannot now reverse it," says Sir James Mansfield in 1812.† And this *decantatum* has since been echoed in cases almost without number, and iterated by text-books as if it was the result of elaborate examination and sound judicial authority.‡

We propose to show in this paper, in the first place, that the case in question was originally without foundation in the law of conditions, as it then existed, and was without subsequent confirmation by decision until the case first above cited; that it had, therefore, no greater claim to be recognized at that time as settled law than any other "venerable error;" that, in the second place, since that recognition it has, with hardly an exception, been confirmed by no decision; and, while referred to by the *dicta* of judges or text writers as law, has been with almost entire uniformity disapproved of in regard to the doctrine it propounds, and only recognized by each case on the ground that the principle it declares has been so long conceded as settled law;* and that, in the third place, the idea on which it was actually founded has been entirely controverted by modern decisions.

The case, as reported by Lord Coke,† was decided 45 Eliz. (*anno* 1603), and was this: A lease for years by the President and Scholars of Corpus Christi College, Oxford, was upon "proviso that the lessee and his assigns should not alien" "without the special license of the lessors." Such a license was granted by the lessors to the lessees to alien *quibuscunque;* and the lessee aliened the term to one Tubbe, from whom by mesne assignment it came to the defendant. The lessors re-entered for condition broken by the latter assignment, and demised to the plaintiff, who entered and sued the defendant in trespass for a re-entry made upon him by the latter. It was held by the Court, "that the alienation by license to Tubbe had determined the condition. So that no alienation which he [or any one else] might afterwards make could break the proviso or give cause of entry to the lessors." In the report of this case by Coke various reasons, or, rather, various forms of one reason, are given for this "extraordinary" conclusion; but when examined they will be found to be merely iterations in different shapes of the proposition, that a condition is an entire thing and cannot be apportioned. In considering the weight of this case it is to be borne in mind that Coke, in his reports, as a rule, expanded the points decided according to his notion of their import-

* *Brumhell* v. *Macpherson*, 14 Ves. 173.

† *Doe* v. *Bliss*, 4 Taunt. 736.

‡ See per Nelson, C. J., *Dakin* v. *Williams*, 17 Wend. 447; Walworth, Chancellor, s. c., 22 Wend. 201, 209; also, *Tenn. M. & F. S. Co.* v. *Scott*, 14 Mo. 46; *Lynde* v. *Hough*, 27 Barb. 415; Williams Real Prop. 354; 2 Prest. Conv. 197; 2 Greenl. Cruise, 10; etc.

* See authorities in preceding note, and *post*.

† 4 Co. 119; s. c. *nom. Dumpor* v. *Syms*, Cro. Eliz. 315, where it is reported as decided 40 Eliz., and in 1 Rolle Abr. 471 as 43 Eliz.

ance, and that much, if not most, of the so-called resolutions of the Court, are the amplifications or disquisitions of the reporter. That this was so in this case will be apparent on referring to the parallel report in Croke,* where it appears that five points were made for the defendant in the case, and that the rule in question, which occupies in Coke all but five lines of the three pages of the report, is determined by the three judges —Popham, Gawdy, and Clench—in a dozen lines.

In the report in Croke the argument of defendant's counsel is based on the entirety of a condition and its insusceptibility to apportionment, and the case of *Lylds* v. *Crompton*† is relied on, where, on a like condition in a lease to three, a license was granted to one to alien parcel of the demised premises, and this was held to bar the lessor from entry for a subsequent unlicensed alienation of the residue by the other two. One other case was also referred to.‡ Upon this the Court say that "the condition was gone and discharged by this dispensation to alien to the lessee himself; for the condition being once dispensed with, it is utterly determined; for it cannot be discharged for a time and *in esse* again afterwards." Popham, C. J., then refers to and denies the soundness of a case § which had held the exact opposite of *Lylds* v. *Crompton, supra;* adding, "the lessor cannot enter, because if he should enter for the condition he should enter upon the entire [estate] as it was limited; and if he should enter upon the entire he should destroy that which he had licensed to be aliened, which he cannot do, and therefore the condition is entirely gone; for it cannot be *in esse* for part and destroyed for the residue."

This is the whole of this celebrated case. But before proceeding to examine the law of conditions and the authorities bearing thereon, as they existed at this time, we recur a moment to Coke's report. In Croke the decision is, as we have seen, based solely on the entirety of the condition; and this though it expressly and in terms contemplated assignment, as it ran to and bound the lessee *and his assigns*, is held defeated by one assignment in the very mode agreed upon in the demise: viz., by license. The natural construction would clearly have been that suggested by Lord Eldon:* "When a man demises to A., his executors, administrators and assigns, with an agreement that if he or they assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonable originally to say that a license granted was not a dispensation with the condition, the assignee being by the very terms of the original contract restrained as much as the original lessee." But as appears by the language of Popham, C. J., which we have quoted, the case was decided in mistaken analogy to cases where the condition was sought to be apportioned between several parcels demised, or part conveyances of the reversion.†

The reasons given by Lord Coke are in the same key, namely, the entirety of the condition; and are sought to be supported by the same analogy and the same references. They do not advance the case at all beyond the proposition stated in Croke; but they are worthy of attention as showing the inevitable consequences of the doctrine, in which view we shall recur to them later. "The lessor," he says, "could not dispense with the alienation at one time and that the same estate should remain subject to the proviso after." The next reason is the same idea expanded. "And although the proviso be, that the lessee or his assigns shall not alien, yet where the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as, by the force of the lessor's license and of the lessee's assignment, the estate and interest of Tubbe was absolute," &c. But how was Tubbe's estate absolute? The assignment by the

* Cro. Eliz. 815.

† 1 Rolle Abr. 472; s. c. *Leeds* v. *Crompton*, Godb. 93, decided 28, 29 Eliz.

‡ *Anon.*, Dyer, 152; *post*, p. 624.

§ Dyer, 33½.

* *Brummell* v. *Macpherson*, 14 Ves. 173, 176.

† *Lylds* v. *Crompton*, 1 Rolle, Abr. 472; Winter's Case, Dyer, 308; *Anon.*, Dyer, 152.

lessee, though unrestricted, could of itself effect no such result; for he could not grant a greater estate than he himself had. But the license gave him no greater estate nor enlarged his original one: it simply authorized him to transfer what he received by the demise, which was an estate restricted to his personal occupancy. Of this restriction, and this only, the license relieved him, and it was the estate freed from this restriction only that he transferred. The fallacy of the court's argument lay in their confounding the right of the lessee to transfer without restriction, with a right in him to enjoy without restriction. The demised estate never was freed of the condition, so far as it related to assigns. It was not before the assignment, for the license was simply for the lessee, and not for his assigns to alien; nor at or after the assignment, for then the license was exhausted.

In order, therefore, to sustain their point, the broad proposition had to be maintained by the court, that the alienation in question was really an apportionment of the condition or in analogy thereto, and that, although the license was in terms no dispensation with the condition as originally created, but simply pursuing the exception there stated, yet a condition in a lease was a mysterious entity that operated independently of the contract which created it, or the benefit of the party for whom it is reserved, and, if its operation was once interfered with, ceased to exist.

That such was the view entertained by Lord Coke is evident from his decisions at this period,* and from the similar doctrine laid down by him, and which obtained equally at that time, that a condition of avoidance in a lease was absolute, and terminated the lease without the lessor's will, or even against it — a proposition which the sounder sense of a later day has entirely repudiated.† We come then to examine the rule forbidding the apportionment of a condition and see on what it was founded, and with what limitations; and what application it has to the doctrine of *Dumpor's Case.*

* See *Hitchcock* v. *Fox*, 1 Rolle, 68, 70; commented on later.

† Taylor, Landl. & T. (5th ed.) §§ 412, 492, and cases cited; *post*, p. 627.

A condition is a creature of contract. It gives, however, rights of a more sweeping character than a mere covenant, laying, as it does, the foundation of a proceeding *in rem*, enforceable by the party himself in whose favour it is created; affecting the quality of the estate to which it is annexed; and, when enforced, abrogating all intermediately acquired derivative rights. Thus dower and courtesy in real property, * or the title of a *bonâ fide* purchaser without notice in personal property † are equally defeated by the enforcement of a condition. A condition does not affect the intermediate *enjoyment* of the estate already had by the grantee, and in so far is unlike a rescission of a contract; but it seems logically to follow from its nature, as a defeasance or defeat of the grant made, that all intermediate creations of *title* by the grantee should fall with his estate, and to this extent it is in effect precisely like a rescission. Hence, if there existed prior and valid parcel alienations, made by or with the consent of the grantor, and which he was therefore estopped to defeat, a technical or strict construction of a condition, as a rescission, which to be good, must be total, would hold the condition barred and destroyed thereby. And such a strict construction seems to have been adopted in regard to conditions generally.

Thus in an early case ‡ it was held that if the condition was, that "it shall not be lawful for the lessee to give, grant or sell his estate, &c., without the leave of the lessor," as assigns were not mentioned, it did not outlast the lives of lessor and lessee, and the latter's executors succeeding to the term, as assigns in law, might alien without leave.§ But

* 1 Washburn Real Prop. 132.

† *Coggill* v. *Hart. & N. H. R. R.*, 3 Gray, 545; *Whitney* v. *Eaton*, 15 id. 225.

‡ *Anon.*, Dyer, 66.

§ Whether devisees, executors, or administrators were assigns or not, was formerly much debated. That devisees were, seems to have early been settled: *Parry* v. *Harbert*, Dyer, 45 *b*; *Knight's Case*, Cro. Eliz. 60; *Berry* v. *Taunton*, Cro. Eliz. 331; notwithstanding some doubts: *Fox* v. *Swan*, Styles, 483; *Hitchcock* v. *Fox*, 1 Rolle, 48. Executors, on the other hand, as well as administrators, come in by act of law, and it was then and has ever since been held that, even if assigns were expressly mentioned, this would not include those who came

as it had been held in the course of the case of *Stukely* v. *Butler*,* that, if assigns were mentioned, there could be no restraint by condition against alienation, the result was that no conditions against alienation could be made which would operate beyond the life of the lessee. The former notion was, however, corrected by later decisions. †

In the same spirit of literal and strict construction, the doctrine of the non-apportionment of conditions seems to have been established; if, indeed, it should not rather be said to have been assumed. The authorities on the point seem certainly to justify the latter phrase.

In *Dumpor's Case*, three cases are referred to as conclusive on this doctrine. ‡ The first of these was upon the apportionment of the condition as a severance of the reversion. It seems to have been very fully discussed, as if the point were still new, and is given in several different reports; § that in Leonard being at the greatest length, but that in Dyer the clearest. The case, which was decided 14 Eliz. (1572), was that, after a lease for years of three several manors rendering rent, with a condition, if the rent or any part of it were behind, of re-entry into "all of said manors," the lessor granted the reversion of part of manor A to one person, and of the residue of A and all the other manors to another.

The question was, whether the latter grantee could enter for condition broken. It was held not. "All agreed that, by a grant of the reversion of part of the lands, the condition is confounded in all, for it is a thing penal and entire and cannot be apportioned. . . . . And the lessor may not enter into these lands for condition broken, for then he might destroy his own grant, and therefore he cannot be as to that of his former estate." "All except Mounson thought that the assignee ought to be of the entire reversion, as it was in the lessor himself who made the condition, and not of part of the reversion, for divers inconveniences," &c. And there can be no doubt that, on a strict construction, this was a just conclusion, for the condition in this case was to re-enter into "all the manors," which clearly meant that the reversionary title should remain in one person only, for if this right accrued to each parcel grantee of the reversion, their claims to the whole would at once conflict.

If, however, a sensible instead of this strict and literal construction had been adopted, and the condition taken distributively, there would seem to be no violation of legal principle in apportioning, even in this case, the condition, any more than the covenant it was inserted to enforce; and the true effect of the rule that the lessor should be in of his old estate, would be merely that he should be relieved from all intermediate incumbrance or derivative title or claim created *by the lessee*, not that he should be construed to claim what he had effectually parted with; in other words that, as the condition was inserted for his benefit, he could waive its operation in part, though he should not be prejudiced by intermediate acts of the lessee.

That a similar construction was given in the second of the cases referred to is not by any means clear. Here it was not the reversion which was severed, but the premises demised. The case, as given in Rolle's Abridgment,* is certainly broad enough. "Si A leas terre al 3 sur condition que eux ou ascun de eux nalieneront sans license del lessor et puis lun alien per license del lessor, ceo discharge tout le condition quant a lauters deux aussi." In Godbolt,† however, the report is, that "the lessor made a license that A., B., *or* C. might alien:" the question seems to have been whether "the same is a good license, notwith-

in *in invitum*, as by act of law: *Windsor* v. *Berry* (24 Eliz.), Dyer, 45 *b* n.; *Anon*, Dyer, 6 *a*; *Anon.*, Dyer, 45 *a*; *Moore* v. *Farrand*, Leon. 3; *Anon.*, 3 Leon. 67; *Doe* v. *Carter*, 8 T. R. 57; *Doe* v. *Bevan*, 3 M. & S. 353; *Smith* v. *Putnam*, 3 Pick. 221; *Bemis* v. *Wilder*, 100 Mass. 446; *Jackson* v. *Sheetz*, 18 Johns. 174, &c.; and, as such legal assignee ought not to be incumbered with the term, his assignment was not prohibited by a like condition: *Moore* v. *Farrand*, and *Doe* v. *Bevan*, *supra*; though *Anon.*, Dyer, 6 *a*, seems *contra*.

* Hobart, 168, 170.

† *Dennis* v. *Loring*, Hard. 27; *Weatherall* v. *Geering*, 14 Ves. 511.

‡ *Winter's Case*, Dyer, 308; *Anon.*, Dyer, 152; *Lylds* v. *Crompton*, 1 Rolle Abr. 472; s. c. *nom. Leeds* v. *Crompton*, Godb. 93.

§ As *Winter's Case*, Dyer, 308; s. c. *nom. Lee* v. *Arnold*, 4 Leon. 27; s. c. *nom. Appowel* v. *Mounoux*, Moor. 97.

* I. 472.

† P. 93.

standing the uncertainty;" and there is not a word of discharge by a partial license.

On the contrary, in the case reported in Dyer, 334 (16 Eliz.), exactly the opposite doctrine was laid down. The case was on a demise and condition similar to the last. "The lessee, by the assent of the lesssor, aliens parcel, and afterwards he aliens the residue without his assent, and he for that *re-enters into the residue.* And it was doubted in B. R. whether he could do that, inasmuch as he had dispensed with part of the condition, which is an entire thing, &c. And afterwards the entry of the lessor into the residue was adjudged to be lawful notwithstanding," &c.

This decision is denied to be law in *Dumpor's Case.* But it is surely as sound in principle as the point in *Lylds v. Crompton;* and as authority is better than that which only appears in a digest, and is not mentioned in the actual report. Moreover the court which pronounced this decision is the same which decided *Winter's Case* two years before,—the case mainly relied on by the court in *Dumpor's Case,*—and there seems no reason to doubt the correctness of the report of one more than of the other decision.

It is moreover remarkable that while the entirety of a condition is thus insisted on, and its insusceptibility to apportionment considered so essential a characteristic, the very courts which most strenuously enforced this doctrine limited it to apportionment by the acts of parties; and admitted that apportionment could always take place by act of law.* But if the condition were in its nature entire and indivisible, one apportionment would be as fatal as the other; and there was no greater reason why the levying creditor, assignee in bankruptcy, or heir to estate in borough English or copyhold should avail himself of the condition for his parcel of the reversion of the estate demised than any parcel grantee of the landlord. It is indeed such distinctions without a difference as this that mar the symmetry of the real property system of law bequeathed to us.

But even if we concede that this doctrine of the apportionment of conditions, so imperfectly supported by authority, has become too firmly established to be controverted at this late day, it affords no foundation for the rule in *Dumpor's Case.* The analogy attempted between these cases of destruction of the condition either by severance of the reversion or discharge of part of the demised premises and the rule there applied, wholly fails. In these cases, the lessor, re-entering, cannot be in of his old estate; if he should, he would in the latter instance destroy his prior grant to the lessee, and in the former to the other parcel reversioner.* But no such bar existed to the re-entry of the lessor upon the assignee in *Dumpor's Case.* The lessor so entering is in of his old estate, and of all of it; and defeats no estate previously exempted from the operation of that entry. The license given relieved the estate of the lessee; but by the same act that estate terminated and the assignee's commenced, to which the license had no application.

Indeed, if the rule in *Dumpor's Case* is closely scrutinized, it will be found to result in the extraordinary conception that it is impossible to create a limit or exception to a condition in its inception without avoiding the condition *in toto.* This will be evident if we examine the third case relied on in the principal decision as authority.† "This clause in an indenture of lease for years. 'Provided always . . . that neither the lessee nor his executors or assigns shall not alien nor grant over the term to any person or persons without license of the lessor, but to the wife or one of the children of the lessee.' The lessee died, and his executors granted the term to one of the sons of the lessee *according to the proviso. Quære* whether he may grant this over to the stranger without a license. And Brooke, Brown, and Dyer thought he could not; but by Stamford and Catlin, he may, because the restraint of the clause was determined when the grant was to the son. But *quære* this." It is not a little surprising to find this cited as an authority for the determination of a condition when three judges out of five—

* *Dumpor's Case,* 4 Co. 119, 120; *Apporel v. Monnoux,* Moor. 98; s. c. *Winter's Case,* Dyer, 308; Co. Lit. 215 *a;* 5 Viner Abr. 300; *Anon.,* Godb. 2; *Anon.,* Moor. 91; *Anon.,* Dyer, 6 *a.*

* See *supra,* per Dyer, J., Dyer, 309; per Popham, J., Cro. Eliz. 816.

† Dyer, 152.

two of them of such eminence as Brooke and Dyer—decided exactly the opposite. It seems, on the contrary, to be as strong an authority against the idea of *Dumpor's Case* as could be imagined.

But what is the proposition put forward by the two judges who thought the condition terminated? No other than this, that the lessor having prohibited any alienation except *to* the lessee's own family, this meant unlicensed alienation *through* them. That is, that, by pursuing the exception originally made to the condition, the whole condition was defeated; or, practically, that a condition to which there is an exception is defeated as soon as made. Surely the meaning of the lessor in this case was too plain for comment; namely, that there should be no alienation by the lessee or any one else except to the lessee's own family, and no further.

A condition that the lessee shall not alien to B. will not of course, on any construction, prevent A., to whom the lessee aliens, in turn assigning to B. * It would be otherwise if the condition were that the lessee should not permit B. to take.

The only confirmation therefore to the view taken by the two judges, is in the case of *Whitchcocke* v. *Fox*, 12–14 Jac. 1 (*annis* 1614–16);† which, as it occurred so soon after *Dumpor's Case*, and was decided when Lord Coke was on the bench, is rather parcel of the doctrine of that case than a subsequent recognition of it. It was three times argued and often reported, but the report of Rolle, though diffuse, seems the most exact. The facts were that a lease was made upon the express condition that the lessee *and his assigns* should not alien except to his wife, and the residue to his children, or in default of these to his brothers. His wife dying without issue, he assigned to his brothers, who assigned over, for which latter assignment the lessor re-entered. Several other questions were mooted in the case at great length; but, on the question of the validity of the condition, Coke thought that by the assignment to the brothers the condition was gone; holding broadly the exact position we have stated above as the necessary result of *Dumpor's Case*, "quant l'assignment est un foits fait solonque le condition, le condition est dispense," or an assignment made *in accordance with* an exception to a condition defeats the whole condition; and in support of this he referred to *Dumpor's Case* as his authority. But this view was not concurred in, "mes lauters justices semble a douter de cest point." At the third argument * the correct view was strongly urged, namely, that an exception was no dispensation, and that the lessee's assigns being restricted by the same instrument which allowed him to assign to his brothers, his brothers as such assigns were as much bound as he; "ici per cest exception ils esteant assignees ne sont exclude hors del condition." Coke, however, adheres to his view (again relying on *Dumpor's Case*), that an exception defeats the entire condition; and it is probable that the other judges at last concurred in this opinion. If so, the doctrine of this case forms the clearest possible *reductio ad absurdum* of the idea of *Dumpor's Case*.

We conceive therefore, that, from this review of the law and the state of the cases at the time *Dumpor's Case* was decided, it sufficiently appears that that idea has no support from any analogy to the doctrine of non-apportionment, even were this doctrine better founded on authority or principle than it seems to have been; secondly, that it was wholly without antecedent authority and contrary to the only prior case really *in pari materia* and the grave authority of Dyer and Brooke therein; and, thirdly, that when carried out to its natural consequence, as in *Whitchcocke* v. *Fox*, it led to a conclusion clearly absurd.

We are next to consider what modern recognition it has received. In 1807, after a lapse of two centuries, it is referred to by Lord Eldon,† as "the law of the land;" and by Sir James Mansfield in 1812,‡ as "law for so many centuries that we cannot now reverse it." It is somewhat remarkable that in each instance the recognition of its (supposed) authority was accompanied with the em-

* *Anon.*, Dyer, 45 *a*.

† 1 Rolle, 389, s. c. *nom. Hitchcock* v. *Fox*, 68, 70; s. c. *nom. Whitchcot* v. *Fox*, Cro. Jac. 398; s. c. *nom. Fox* v. *Whitchcock*, Bulst. 290.

* 1 Rolle, 390.

† *Brummell* v. *Macpherson*, 14 Ves. 170.

‡ *Doe* v. *Bliss*, 4 Taunt. 735.

phatic dissent from its soundness which we have quoted at the beginning of our paper; and we are led to inquire somewhat curiously into what intermediate confirmation it had received, to prevent its being then squarely overruled. It may excite some surprise to learn that in the whole period it had not been confirmed, indeed, hardly even mentioned, in a single case. It had at most been merely acquiesced in by the bar, never recognized by the bench, and the expression of Mansfield, C. J., leaves it doubtful if even the former were the fact. These cases or rather this case of *Brummell* v. *Macpherson*, for *Doe* v. *Bliss* turned as we shall see on quite a different doctrine, not only was the first, but, as will appear upon an examination of the decisions, was, with somewhat doubtful exception, in the English Courts, the last and only case where the point was directly or even collaterally in issue. In the repeated references in the reports and text-books which have been since made to *Dumpor's Case*, and which are often loosely stated as indorsements of it,* the point did not arise, its principles have never been examined, and Lord Eldon's ruling and remark, or that of Mansfield, C. J., have been echoed without variation or inquiry; and the result of all the succeeding cases has been an almost unbroken dissent from the soundness of the rule, coupled with an acquiescence in it because of its supposed long standing; this last being wholly based on the case of *Brummell* v. *Macpherson*.

In this case it was, it is true, affirmed. Three considerations are, however, to be borne in mind. First, that it was not likely that a judge of Lord Eldon's proverbially cauticus temper would be the first to overrule a case which had Coke's positive authority to support it. It is even remarkable that his lordship could bring himself to comment upon it in the terms he did; "video meliora proboque, deteriora sequor." In the second place, it certainly does not add to the weight of his confirmation, that he refers to the case from Dyer, 152 (upon which we have fully commented above), as sustaining *Dumpor's Case;* for, as the decision of the former case was exactly the reverse of the point to which it is cited in the latter, it seems much as if his lordship had not looked at the original report; and that, had he done so, his view of the weight of *Dumpor's Case* might have been reversed, in spite of the long standing of that precedent. Indeed, it might well have been so; as this latter circumstance presented little reason on the ground of inconvenience for adherence to the rule *stare decisis*. A holding under a lease is necessarily of brief duration; and few titles, if any, could have been so founded on the discharge of a condition under the rule in question that such a decision could have unsettled them. Perhaps a case could hardly be presented where the correction of a venerable error would have led to so few dangerous results.

When a doctrine, admitted to be unsound, has nevertheless been so long "the law of the land" that many titles are founded thereon, or that general commercial dealings and usages have conformed thereto, a valid reason may exist for hesitancy to overrule it. But no such considerations did or could, from the nature of the case, exist with regard to the proposition under consideration. A further argument exists, however, at this day, that had not developed in Lord Eldon's time, and which might have altered his lordship's view in this case. It was a rule laid down with equal emphasis by Lord Coke as part of the law of conditions, conceived in the same spirit with the rule we are now considering, and much more consonant than that with common sense, that a lease for years expressed to be void became absolutely so by breach.* That this left the lessor at the mercy of a knavish lessee who desired to end his tenancy, and enabled the latter to take advantage of his own wrongful act, afforded no ground against it in the view of the earlier and of some of the later authorities.† Nevertheless, though it had remained as unquestioned law for two centuries, at about the same period that *Dumpor's Case* was affirmed

* 1 Washb. Real Prop. 317; Taylor, Landl. & T. (5th ed.), §§ 286–288, 410.

* Co. Lit. 214 *b*.

† *Pennant's Case*, 3 Co., 64; *Browning* v. *Beston*, Plowd. 131; *Mulcarry* v. *Eyres*, Cro. Car. 511; *Finch* v. *Throckmorton*, Cro. Eliz. 221; *Doe* v. *Butcher*, Douglas, 51 and n.; 2 Prest. Conv. 195-197; *Kenrick* v. *Smith*, 7 W. & S. 41; *Davis* v. *Moss*, 38 Pa. St. 346, 353.

by Lord Eldon, solely because it was "the law of the land," that is, had not then been overruled, the former doctrine was reversed, and the spirit of the engagement held to control its letter; and such a term is now held not void, but voidable only at the lessor's election.* It is conceived that no reason whatever can be urged why the rule in *Dumpor's Case* should not have been similarly overruled.

The recognition which *Dumpor's Case* has received since *Brummell* v. *Macpherson*, has consisted in nothing but the continued establishment of exceptions to it, and limits to its application, which, if carefully reflected on by the courts declaring them, would have been perceived to virtually overrule it.

In the next case, *Macher* v. *Foundling Hospital*,† before Lord Eldon in 1813, *Dumpor's Case* was referred to by him in the usual style, "It has long been settled at law," &c., adding at once, however, "I should not have thought a very good decision originally." He accordingly held that its construction should be strict, and that it did not apply to the case before him. This in fact was one of waiver not of license, and in accordance with the now well settled distinction would have operated no discharge of the condition.‡

In the next case, *Doe* v. *Bliss* § (1812), however, this distinction was first taken in distinct terms, and has ever since been adhered to. The condition was against assigning or underletting; one underlease had been made, and subsequent rent received; and it was claimed that by *Dumpor's Case* the condition was gone. The court, however, admitting *Dumpor's Case* to be law in the depreciatory language quoted at the beginning of this paper, decide that a mere "tolerance" of one breach is no bar to the entry for another; and so the rule in question did not apply. There is no doubt that the conclusion was sound; but there is also as little doubt that there is no real distinction between a waiver and a license, and that whether a breach of a condition is allowed by prior authority or subsequent acquiescence, the breach is as clear, and the condition, if discharged at all, is as much so by one as by the other. In holding the condition not discharged by the waiver, but the breach only, the court in effect overruled the doctrine of *Dumpor's Case*, for they denied the entirety of the condition and its consequent incapability to survive a breach, and affirmed the capacity of its obligation to be continuous.

In *Lloyd* v. *Crispe*,* decided the next year, there was a condition against the lessee, his assigns, executors, &c., assigning without license, except by will. The lessee demised the term to his executor, who assigned to the defendant. The latter occupied and paid the rent to the lessor, and then contracted to sell to the plaintiff, who at first paid a deposit, but subsequently refused to take, because the defendant had no license from the lessor to alien, and brought this action to recover back his deposit. It was held by Mansfield, C. J., at the trial, that the vendee was bound, as he knew of the restriction, to take the burden of removing it. At the hearing in the court above it was decided that this burden was on the party seeking to assign; and a new trial was granted. This was the whole case, and it will be evident that *Dumpor's Case* was not involved, or if it came in question at all was not followed. At least the doctrine of the two judges in the case in Dyer,† which Lord Eldon thought so much in point in *Dumpor's Case*,‡ and which was so strenuously urged by Lord Coke in *Whitchcocke* v. *Fox*, § on the authority of *Dumpor's Case*, namely, that an exception to a condition, if pursued, discharges the condition as much as a license, was clearly overruled; for here the condition was considered to be still binding on the defendant, notwithstanding the devise to the executor and his alienation to the defendant, under the exception. *Dumpor's Case* had been referred to by counsel, who contended that the condition was discharged by the lessee's devise or the executor's sale to the defendant. But Gibbs, J., after stating *Dumpor's Case*, said: "But here is an exception out of

* Taylor, Landl. & T. (5th ed.) §§ 42. 492, and cases cited; *Reed* v. *Tuttle*, 35 Conn. 25; *Roberts* v. *Geis*, 2 Daly, 538.

† 1 Ves. & B.

‡ Taylor Landl. & T. (5th ed.), § 287.

§ Taunt. 735.

* 5 Taunt. 249.

† Dyer, 152.

‡ See 14 Ves. 178.

§ 1 Rolle, 70.

the original restriction to alienate, so that in the original alienation by will there was nothing to license;" and Chambre, J., added: "It is no breach of the condition if it is excepted by the condition itself. It is no violation of the condition imposed by the landlord. There is no permission given by him." In the course of the decision, however, it was intimated by Mansfield, C. J., that a new trial might be of no use to the plaintiff, as the landlord by receiving rent had waived the forfeiture if any had occurred by the executor's assignment; but as a new trial was in fact granted, and this remark was the *obiter dictum* of a single judge, in which the others did not join, it would in any event afford but little support to the rule of *Dumpor's Case*, and is rendered of still less weight even as a *dictum*, from the fact that there was no forfeiture in this case at all; since, where one receives a devise of a term as executor, he is not assignee within the purview of the condition, and, as he takes the term merely *virtute officii*, he is allowed in turn to assign, in order to realize the assets of the estate, without avoiding the lease.*

Of equally little pertinency is the case of *Doe* v. *Smith* (1814).† Here, on a demise with a condition against assigning or underletting without license, the lessee became bankrupt, and his assignees in bankruptcy sold the term to one who reassigned it to the original lessee, and he underlet. For this underlease, ejectment was brought. The case turned wholly on the provision of the Statute 49 George 3, c. 121, § 19, that a bankrupt should be relieved of all covenants, &c., after his assignees had accepted the lease. "The question is whether the legislature have not used such extensive words as to put an end to all covenants of the lessee whatsoever, and we are of opinion that they have." It was accordingly held that there was no forfeiture; and *Dumpor's Case* was not even referred to.

The last of these cases was *Mason* v. *Corder* (1816).‡ The question here was the same as in *Lloyd* v. *Crispe*,§ the action being assumpsit, for not accepting an assignment, against one who had contracted with the lessee to purchase the lease, and had refused to do so because the lessor would not license the assignment, the demise containing the usual condition against assigning without license; and the court held, on the authority of *Lloyd* v. *Crispe*, that the lessee was bound to procure such a license, and nonsuited the plaintiff. So far, there was no question of *Dumpor's Case*. But it also appeared that the lessor had offered to give a new and similar lease to the assignee, with a like condition against his assigning, &c., in it. This the court held he was not bound to take; but that, as the lessee had contracted to sell him the lease, and as to do this would require the landlord's license, and this if given would avoid the condition under the rule in *Dumpor's Case*, the assignee had a right *to expect the term free from the condition* as the real purport of his bargain. This was certainly going an extraordinary length in interpretation. The sensible meaning of the bargain made rather was that the assignee should be entitled to what the lessee had, namely an estate restricted from assignment, and no more, and not have a right to prescribe the mode in which the term should be transferred to him. Indeed this was urged by Best (afterwards Chief Justice of the C. P.), for the plaintiff, contending that the lessor might well under the lessee's contract give his license to the assignment, with a like restriction upon the assignee's alienation; but Gibbs, J., "intimated that there would be great difficulty in effectuating such a restriction, for that the doctrine of *Dumpor's Case* is that the condition is indivisible." So far as this general proposition goes, we have amply shown heretofore that no such broad doctrine can be maintained; apportionment by act of law, by the wrong of the lessee, or even by subdivision of the granted estate having long been well-established exceptions thereto. But precisely the thing here declared to be impossible, it has in effect long been settled, can be done; and the only means requisite "to preserve the operative force of the condition so as to guard against future assignments," is, when licensing an assignment, to execute therewith a defeasance. "Leases for years are considered in law as mere chattel interests, they may be defeasanced by means of a grant or condition, as well after they are

* See *ante* p. 620, n. 6.

† 5 Taunt. 795.

‡ 7 Taunt. 9.

§ 5 Taunt. 249.

created as at the time of their creation;"* and the distinction between such a defeasance and a conditional license is only in the name,† as each reannexes to the term the condition declared to be discharged.‡

We have been thus particular in the examination of these cases, because they are doubtless the foundation of the doctrine of *Dumpor's Case* as a modern rule of law, and are usually referred to, as if expressly confirming that case in terms, whereas it was in issue, necessarily only in the first, and collaterally in the last. In one of the remaining four, it did not arise even in the remotest degree; and, in the other three, was so far from being confirmed that these merely established a second exception thereto; namely, that a waiver is no discharge, which is in effect as clear a denial of the entirety of a condition as the earlier and original exception of apportionment by act of law.

What is a license, upon which so much stress is laid as a dispensation not of the breach, but of the condition itself? It is simply "an excuse for a trespass." It is personal merely, and operates to relieve the party, otherwise chargeable with a breach of duty, from the consequence of that one default. It does not relieve him any further, and cannot justify any other default or series of defaults, nor enlarge his estate. These are elementary principles, for which a citation of authorities would be absurd. But what other or less is a waiver? It equally relieves from the consequences of the default or trespass when committed, and sanctions that, when done, which the license permitted to be done. Each therefore presupposes the trespass; that is, that the condition is broken, and each accepts and ratifies and adopts that state of facts. If, therefore, the condition is gone by a license, it is equally so by a waiver; and in holding that a waiver does not discharge the condition but the breach only, we recognize not merely a return to common-sense interpretations, but the adoption of a doctrine radically inconsistent with *Dumpor's Case*.

But this logical consequence of these exceptions does not seem to have been apprehended, and we still find the courts reasserting them, and deciding in accordance therewith, and yet referring to *Dumpor's Case* as if this was not affected by them. In *Doe* v. *Pritchard** the demise was on condition of re-entry, if the lessee became "insolvent and unable to go on with the lease." After this happened, the lessor accepted rent; and it was claimed, in defence to his ejectment, that this waived the forfeiture. It was contended in reply that the one breach might be, but that the condition still subsisted, as it imposed a continuous duty. The court held that the breach was complete once for all; and that *Dumpor's Case* did not apply at all, because, as there was no breach after the waiver, the question of the continuance of the condition did not arise, Taunton, J., remarking *obiter:* "There is a difference between waiving the condition as in *Dumpor's Case* and waiving the particular breach. The courts in modern times have been inclined in such cases to consider the breach overlooked rather than the condition as waived.† But the waiver of the condition is not necessary to the argument," &c.

In order to reconcile the asserted authority of *Dumpor's Case* with the admitted exceptions, text-writers have been driven to assert new distinctions. Thus an able author,‡ after quoting Sir James Mansfield's comments thereon, suggests that, while a waiver will not discharge the condition against underletting and the like, it will a condition against assigning, as here the breach is complete once for all. On the other hand, a prominent English real property writer,§ who is followed by a recent American writer‖ asserts that, after the waiver of one assignment, the lessor may re-enter for a new one. And it is a sufficient answer to the former to say that there is no authority for any such proposition in any decided case. *Doe* v.

* 2 Prest. Conv. 198, 199. So 2 Greenl. Cruise, 10 n. "Under the learning of defeasance a mode may be resorted to by which the objection generally made to give a license to assign can be obviated. Upon the assignment with license a deed of defeasance should be executed in order to determine the lease on alienation by the lessee." Sheph. To. 195.

† Thus the condition in *Fox* v. *Whitchcocke* is called equally a defeasance. 1 Bulst. 290.

‡ Williams, Real Prop. 354.

* 5 B. & Ad. 689.

† 4 Taunt. 735.

‡ Smith, Landl. & T. *117.

§ Burton, R. P. Comp. § 853.

‖ Washburn, Real Prop. *317.

Bliss went on the ground of the "toleration" or waiver, not of the character of the act prohibited by the condition, and the *dictum* of Patteson, J., in *Doe* v. *Pritchard*,* was, as we have seen from the statement of that case, wholly *obiter*.

On the other hand, it has been suggested that a license of a condition to underlet and the like, which from its nature is susceptible of more than one breach, will not discharge the condition, but the breach only.† This proposition, which we shall notice hereafter in considering the doctrine of continuous conditions, though without the support of expressed modern decisions, and contrary to the opinion of some text-writers,‡ is based on the doctrine that a condition may be suspended; which is well sustained by the older authorities. Thus in a case decided 10 Eliz. (*anno* 1568),§ it was held that upon the seizure by a judgment creditor, under an elegit, of a moiety of the reversion, "le condicion fuit suspend pur tout," meaning, apparently, that the condition would revive when the rent of the moiety had discharged the execution. Numerous similar determinations are mentioned by Mounson and Harper in their judgments in *Winter's Case*.|| So in a later case,¶ it was held that the second grantee of a reversion might avail himself of a condition reserved on a lease, though his mesne grantor could not. And this doctrine of suspension constitutes a third exception to the ideal entirety of a condition as conceived in *Dumpor's Case*, and one which, equally with apportionment and waiver, are rather contradictions than exceptions thereto.

The American decisions relating to the rule in question are open to exactly the same comment as the English cases already discussed, and even in a stronger degree; as, with a single and somewhat doubtful exception, there has been no decision directly in point, and the rule has been recognized only to be distinguished, and solely on the ground advanced in *Brummell* v. *Macpherson*. In England, owing to the express adoption of the rule by this case, it remained the law until repealed by statute;* but in this country there is really nothing, with the exception above noted, and occasional *dicta*, more or less clear, to support it; and it has in no case been examined or approved on its intrinsic soundness. It stands, as it has been emphatically described by Mr. Williams,† as an "artificial and technical rule which . . . owes its origin to an antiquated system of endless distinctions without solid differences." Bearing in mind then the clear distinction between the rule and the doctrine of non-apportionment which we have already sought to point out; and that the latter doctrine, whatever may have been its original soundness and proper limits, bears no analogy whatsoever to the rule in question, or gives any support thereto in the decisions which have enforced it,‡ we proceed to examine the decisions in any way properly relating to *Dumpor's Case* in this country.

Tinkham v. *Erie R. R.*, 53 Barb. 393.

In Massachusetts there are certainly but two;§ and these of little pertinency. In the first, which is sometimes referred to as a case of waiver, the condition was in reality merged by the grantee's subsequently acquiring the whole of the reversionary estate. In fact it appeared that there had actually been no breach, because there was no refusal to perform the obligation. In the latter case there was merely a *dictum* on the subject, the question being whether a covenant had been discharged by a license; and the court held that it had not, adding: "It is not the case of a condition which when once dispensed with is discharged for all purposes, and cannot be revived," which was not necessary for the decision.

In Missouri the authorities are similarly unsatisfactory. In an early case|| it is said: "*Dumpor's Case*, though much criticised by eminent judges, is still adhered to as law;" but it was held not to apply to contracts not touching the reality, and a condition in a policy of insurance that the insured should notify the com-

* 5 B. & Ad. 781.

† 1 Smith, Lead. Cas. (5th Am. ed.) 91.

‡ Woodfall, L. & T. (10th ed.) 550.

§ Moor. 91, pl. 225.

|| *Lee* v. *Arnold*, 4 Leon. 27, 28.

¶ *Pain* v. *Malory*, Cro. Eliz. 832, (43 Eliz.)

* 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 28.

† Williams Real Prop. 262.

‡ *Van Rensselaer* v. *Jewett*, 5 Denio, 121.

§ *Merrifield* v. *Cobleigh*, 4 Cush. 178; *Gannett* v. *Albree*, 103 Mass. 372, 374.

|| *Penn. M. & F. S. Co.* v. *Scott*, 14 Mo. 46.

pany of a change of ownership, was held binding, after one assent to such a change had been given. There was, however, no soundness in the distinction attempted between real and personal contracts, and the ground taken, in fact controverted the rule of the case referred to. A like *dictum* occurred in *McGlynn* v. *Moore*;* but the single point decided in that case was, that acceptance of rent after the structure is completed waives defects in performance of a contract to build. *Dougherty* v. *Matthews*,† at first sight, seems more in point; a promise by an assignee of a lease, conditioned against the lessee's assigning, to pay the lessor for his permission to assign being held *nudum pactum*. But the decision did not go on the dispensation of the condition by one assignment; but on the ground that the lease not being under seal and the condition in terms applying only to the lessee and not mentioning assignees, its obligation was personal to the lessee and could not bind assigns. The court say: "The lease is not stated to be under seal, and therefore the case does not come within the doctrine of covenants running with the land." "The plaintiff proceeds on the assumption that the assignee could not himself assign the lease without the consent of the lessor; but it is not made to appear by anything contained in the petition that such consent was at all necessary," &c. This is exactly the anonymous case n Dyer‡ hereinbefore referred to, and is undoubtedly sound.

A case occurs in the early California reports,§ whose looseness seems to accord with the generally unsettled state of things in that region at that day. It is held that a "covenant" [*sic*] against assigning without license is discharged by one authorized transfer. *Dumpor's Case* is referred to, from which we may perhaps infer that there was a condition as well as a covenant here. The court, however, repeated that the "covenant" was discharged and add: "It is questionable whether in any case such a covenant would be enforced to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law." We do not know that much comment is necessary upon the opinion of a court that was ignorant that it is only conditions upon grants in fee that are so void.* But as assigns do not appear to have been mentioned in this condition, the decision stands well enough on the same ground as the preceding one, though not adverted to by the court.

In Virginia the point has been referred to in one well-considered case.† It was held here that one underletting was waived by the receipt of rent subsequently accruing; and the case in fact was the same as *Doe* v. *Bliss*,‡ which was held to be conclusive. *Dumpor's Case* was referred to and distinguished, and did not even receive the qualified approval which it has at times had.

In Pennsylvania the point seems to have arisen twice. In the first case§ the facts are quite complicated; but, so far as they relate to our present inquiry, seem to be that the plaintiff, then holding a leasehold interest in certain mills, transferred this to the defendant, on the agreement that he was to receive advances from the latter, who was also, as well as plaintiff, to give his personal services in working the mills, and neither was at liberty to assign without permission. There was no mention of assigns of either party. The defendant, with the plaintiff's assent, was discharged from his undertaking, and another person substituted. But he desiring subsequently to withdraw, the defendant sold out to a new party, and it was claimed that this was a forfeiture of his interest. The court, indeed, held otherwise as a matter of strict law, but gave relief in equity by decreeing a reconveyance. It is remarked incidentally, that a condition once dispensed with is wholly gone. It may be conceded that this was so in this case, as the condition was personal to the grantee, and had been expressly released. It was not the case of a mere license, but of an entire substitution and discharge. But, apart from this consideration, the condition could not apply beyond the first alienation, as it did not run beyond the

* 25 Mo. 384.
† 35 Mo. 520.
‡ Dyer, 66, *a*.
§ *Chipman* v. *Emeric*, 5 Cal. 49.

* *Depeyster* v. *Michael*, 6 N. Y. 467.
† *McKildoe* v. *Darracott*, 13 Gratt. 278.
‡ 4 Taunt. 735.
§ *Dickey* v. *McCullough*, 2 W. & S. 88.

grantee or to his assigns, and so is exactly within the comment on the case of *Dougherty* v; *Matthews, supra.*

The second case* is even less to the point. It was ejectment by the vendor against the vendee for breach of a condition to erect a breakwater and bloomery in two years. The former was built, the latter not; but, after the time had expired, a different structure was substituted, with the grantor's consent therefor. The terms waiver and license are somewhat loosely employed here; but it is evident that neither was correct, as to anything but the time of the obligation. The case was simply one of substituted performance, which of course repels the idea of forfeiture; and the reference of the court to *Dumpor's Case* is entirely unapt. It is to be noticed that the court apparently does not yield to the distinction between realty and personalty set up in the Missouri cases and hereinbefore commented on.

Lastly, the point has been touched upon in New York in more than one instance. The earliest seems to have been *Fletcher* v. *Smith.*† *Dumpor's Case* was referred to, and the unfavorable opinion of Sir J. Mansfield is quoted: "That the license should only have sanctioned one assignment, and that a subsequent assignment without license should forfeit the estate;" in other words, that that case was not law. It was, at all events, entirely inapplicable to this one, and was so held; first, because here there was no license, but a waiver only; and, secondly, on another ground shortly to be considered. Then followed *Dakin* v. *Williams*, twice reported.‡ On the first argument it appeared that the case simply was one of covenant, not condition, and *Dumpor's Case* was held clearly not to apply, and was accordingly distinguished, Nelson, C. J., adding: "The reasons of that case do not seem very satisfactory or conclusive . . . The common sense view of the license to the lessee only, and the one coinciding with the apparent intent of the parties, would seem to be that it merely enabled him to alien the premises, leaving the operation of the covenant [condition] in the lease in full force upon the assignee. To say that it empowered him to assign an absolute estate to the extent of his interest, free from the condition, *is assuming the point in question.*" He then proceeds to say that the law of *Dumpor's Case* was well settled, &c. With all deference to this excellent magistrate, we think we have shown that this was not so. It is indeed a little singular to find so sound a judge next mentioning as part of the same doctrine the non-apportionment of a condition upon severance of the demised premises. That Lord Coke endeavored to deduce both from the same tenet—the entirety of a condition—is indeed true; but that *Dumpor's Case* failed wholly to derive any just support from the notion that the grantor on re-entering must be in of his old estate we think we have fully shown; whereas the letter though not the spirit of that canon did support the latter idea. Yet even as to this apportionment, the judge adds: "I am free to confess that I see no practical difficulty in this respect." At the second hearing a similar view was entertained, and *Dumpor's Case* held not to apply. The subsequent case of *Lynde* v. *Hough** may be readily disposed of. The condition being without mention of assigns, and against underletting merely, the case would in this view have been nearly the same as *McKildoe* v. *Darracott*, *Doe* v. *Bliss*, &c., and the reference to *Dumpor's Case*, as one which, though "wondered at since Lord Mansfield's time, has never been denied," was wholly uncalled for. But as if to make this *dictum* of even feebler relevancy, it appears that the underlease was by an assignee, and as there was no condition whatever against assignment the assignee was not within the condition at all precisely as in *Dougherty* v. *Matthews*, and for even stronger reasons. To the quite recent case of *Siefke* v. *Koch*† the same comment seems to apply, as it does not appear that there was any condition binding the lessee's assigns.

It will be apparent, from this review of the cases, that there is not one which is exactly parallel with *Dumpor's Case*, and that the two or three in which this was not referred to as wholly irrelevant,

* *Sharon Iron Co.* v. *City of Erie*, 41 Pa. St. 341.

† 13 Wend. 530.

‡ 17 Wend. 447; 22 *id.* 201.

* 27 Barb. 415.

† 31 How. Pr. R. 383.

went in reality upon a different state of facts. But a ground appears in several of them, as well as in numerous other modern cases, which is in addition to the several established principles in conflict with *Dumpor's Case* heretofore noticed, and if logically carried out does, we think, dispose of that decision as authority for ever.

This is the doctrine of continuous conditions, into which class, however viewed, that in the case in question will be found strictly to fall. We assume it as proved that there is no distinction between waiver and license; that this distinction was only introduced to avoid *Dumpor's Case*, but had in reality no foundation at common law. We find that even as early as *Macher* v. *Foundling Hospital*,* it was held by Lord Eldon that a waiver by acceptance of rent, of a breach of a condition not to carry on any trade, must be restricted to the trade so permitted, and was equivalent to "that sort of license which it would have been prudent to give," and could not be construed as a license for any other; thus recognizing at once that a license was in fact no more than a waiver, and that such a condition bound as to everything not expressly waived. The same principle underlies in fact all the decisions restricting a second sublease, notwithstanding the permission to make a first one. Such were *Doe* v. *Bliss*, *McKildoe* v. *Darracott*, and other cases already commented on. Of course it is meant that the obligation of the condition is continuous, but not that the occupation under the first demise is a continuing forfeiture.† It is true that in some of these cases the condition against assigning has been distinguished as capable from its nature of one breach only. But such a distinction is without foundation. If the condition was solely framed to bind the lessee, it might be otherwise, as the condition with its covenant is perhaps unable to run without the mention of assigns,‡ and on this ground the cases of *Dougherty* v. *Matthews*, and others hereinbefore referred to, are probably sound. But where assigns are mentioned, the condition is necessarily continuous, because it applies in terms to persons who can only come under its force after one authorized breach; and it presents a stronger case than that of a condition against underletting, because it extends expressly where that and similar conditions apply only by inference. It is idle to say that the condition against assigning is entire, for the very question is, whether it does not properly come under what is a perfectly established exception to that entirety.

The doctrine has indeed not been confined to cases of underletting. Similar decisions have been made in regard to conditions against using rooms in a particular manner;* keeping premises in repair or insured;† keeping up a particular number of trees on the estate,‡ or way open,§ and the like. Indeed, in a recent case,‖ this doctrine was carried so far that a condition against "leaving" a church membership was held continuous, as if the grantee in that case resembled the party in the ballad, who "often took leave, yet was loathe to depart," and remained in a permanent state of departing. We can hardly understand the view of the court in this case, and should conceive that the case rather resembled *Doe* v. *Ries* and *Doe* v. *Pritchard*, already cited. However this may be, it is clear that the law of continuous conditions is well established, at the present day, and that such a condition as that in *Dumpor's Case* comes fairly within its purview.

We conceive, therefore, that we have shown that the rule in question was never good law, of recognized authority, or in accord with modern decisions: that to overrule it, or, rather, to repudiate its imaginary authority, will not only relieve the law of to-day of an incubus, and bring our system of real property into harmony with common sense; but will, in so doing,

* 1 Ves. & B. 188.

† *Ireland* v. *Nichols*, 46 N. Y. 413. So see *Doe* v. *Rees*, 4 B. & C. 384, where a forfeiture of a condition against lessee's insolvency was held not continuous by continued non-payment of scheduled debts; and *Doe* v. *Pritchard*, 5 B. & Ad. 765, where a like decision was made.

‡ See 7 Am. Law Review, 260, 261; also Dyer, 66 *a*, and cases *ante*.

* *Doe* v. *Woodbridge*, 9 B. & C. 399.

† *Doe* v. *Gladwin*, 6 Q. B. 953; *Doe* v. *Jones*, 5 Exch. 498; *Bennett* v. *Herring*, 3 C. B. N. S. 470; *Doe* v. *Shewin*, 3 Campb. 134.

‡ *Bleecker* v. *Smith*, 13 Wend. 330.

§ *Jackson* v. *Allen*, 3 Cow. 220.

‖ *Crocker* v. *Old South Soc.*, 106 Mass. 489.

involve little or no disturbance to settle titles or vested rights of ownership. And, finally, that the argument of long standing, which is the whole and only ground of acquiescence in its authority by modern judges, ought, in view of these facts, to avail nothing; as an admitted error should receive no greater tolerance, merely because it is venerable. We have already noticed one of kindred origin and equal age, which the better sense of a later day has corrected;* and we may refer, among many other examples, to the well known instance in *Semayne's Case*,† where the proposition that illegality of an officer's entry did not affect the validity of his service of process was enunciated by Lord Coke, founded on the high authority of Littleton a century before;‡ and received the recognition of the most approved text-writers at a later day.§ Yet this has since been entirely reversed,‖ and the contrary doctrine is the settled rule of modern law.¶ Why should not *Dumpor's Case* receive the like measure from even-handed justice?

COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT.

There have been some fluctuations of judicial opinion as to the extent to which communications between solicitor and client are privileged from disclosure. It has, indeed, long been settled, and was pointed out by Wigram, V. C., in *Walsingham* v. *Goodricke*, 3 Hare, 124, that communications between solicitor and client, made pending litigation, and with reference to such litigation; or made before litigation, but in contemplation of and with reference to litigation which was expected and afterwards arose; or made after the dispute between the parties followed by litigation, but not in contemplation of or with reference to such litigation, are privileged from disclosure, whether the party interrogated be the solicitor or the client. It has also been settled that professional communications between a party and his professional adviser, although they do not relate to any litigation either commenced or anticipated, are privileged *where the solicitor is the party interrogated.*

It has, however, been a matter of doubt whether the rule extends beyond the last case, and embraces such communications where the client, and not the solicitor, is interrogated. Some of the cases seem to imply that the privilege of the solicitor is more extensive than the privilege of the client, and that communications might pass between a solicitor and client as to which the solicitor, if called upon to give evidence, might refuse to answer, while the client could not; although if the communications had been made after a dispute arose the client also might refuse. Well might Vice-Chancellor Knight-Bruce remark (*Pearse* v. *Pearse*, 1 De G. & Sm. 27):—"What for the purpose of discovery is the distinction in point of reason or principle between such communications and those which differ from them only in this, that they precede instead of following the actual arising, not of a cause of dispute, but of a dispute, I have never hitherto been able to perceive." Anomalies of this kind are often the precursors of a broader rule in which arbitrary distinctions are merged, and the decision in *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. 361, has at length finally established the law on a footing accordant with common sense and general convenience.

This case was a suit by a commoner against the lord, to establish rights of common claimed by the plaintiff and others. The plaintiff was required by the defendant to make an affidavit as to documents. Accordingly, he admitted the possession of correspondence between himself and the solicitors of his family, or between himself and his solicitors in the suit, written in contemplation or in the course of the suit, or with reference to the subject-matter in dispute, and of letters between his mother, from whom he derived title, and her solicitors, with reference to questions connected with the matters in dispute in the cause; but he stated that all these documents were of a private and confidential character, and that he believed them to be privileged, and therefore objected to produce them. The defendant took out a summons to compel productions of these documents,

* *Ante*, pp. 627, 628.

† 5 Co. 93.

‡ 18 Edw. 4, fo. 4.

§ Bac. Abr. Sheriff, n. 3, &c.

‖ *Ilsley* v. *Nichols*, 12 Pick. 270.

¶ 1 Smith, Lead. Cas. (5th Am. ed.) 194, and cases cited.

which was heard on appeal by Lord Selborne, C., and Mellish, L.J.

The judgment of Lord Selborne, in which Mellish, L.J., concurred, traces the development of the rule as to the compulsory disclosure of communications between solicitor and client, and shows the successive steps by which the law has reached a broad and reasonable footing. In *Bolton* v. *Corporation of Liverpool*, 1 My & K. 88, *Hughes* v. *Biddulph*, 4 Russ. 190, and some other cases about the same date, the doctrine of protection was expressed in terms which had a tendency to narrow its scope. But in these cases a decision on the general question was not required; and the subsequent case of *Pearse* v. *Pearse*, 1 De G. & Sm. 12, clearly showed that the tide had turned. The case of *Minet* v. *Morgan*, coming at the end of a series of authorities tending in the same direction, seems to place beyond question the doctrine that whether the solicitor or the client be the party interrogated it is sufficient for the protection of communications between the party or his predecessor in tittle and his solicitor acting in a professional capacity, and that it is not necessary that they should be made either during or relating to an actual or even an expected litigation. Thus a simple principle has superseded a number of partial rules and arbitrary distinctions.—*Solicitors' Journal.*

SUING UPON AN ADVERTISEMENT OF AN AUCTION.

A novel attempt was made in *Harris* v. *Nickerson*, 21 W. R. 635, L. R. 8 Q. B. 286, to fix an auctioneer with liability for withdrawing from a sale certain goods which had been included in the advertisement. It is difficult to see how the plaintiff in that case could have possibly recovered damages, for he had bought other things at the sale, so that the expenses of attending the sale, in respect of which he claimed, were not incurred solely for the sake of the articles withdrawn. But on principle the action was really without grounds. To support it it must have been held that an auctioneer, by advertising goods for sale contracts with any one and every one who comes to the sale to sell them. To have held so would certainly have been inconsistent in principle with *Spencer* v. *Harding*, 19 W. R. 48, L. R. 5 C. P. 561, where the defendant who had offered goods for sale by tender was held not to have contracted with the highest bidder to sell to him. In the case of *Harris* v. *Nickerson*, however, there was even less to bring the plaintiff into privity with the defendant than in *Spencer* v. *Harding*, for in the last named case the plaintiff had at least made a bid, and so had brought himself into a position of apparent analogy with that of a person who furnishes information in answer to an advertisement offering a reward, as in *Williams* v. *Carwardine*, 4 B. & Ad. 621, and *Tarner* v. *Walker*, 14 W. R. 793, L. R. 2 Q. B. 301. Apparent analogy, we say, because there were wanting in *Spencer* v. *Harding* any such words of promise as are contained in these advertisements. Nor are there ever any such words of promise in an auctioneer's advertisement. The case was argued, however, on the authority of *Warlow* v. *Harrison*, 7 W. R. 133, 1 E. & E. 295; but there again, the goods had actually been put up for sale and the plaintiff had made a bid—in fact, he was the highest bidder; and if only it could be held that actually putting up the goods for sale and taking bids created an implied contract to sell to the highest bidder, that contract had been made, and the plaintiff was in the same position as the person who answers an advertisement offering a reward. It is very difficult to say that *Warlow* v. *Harrison* (if it is good law) does not establish that under such circumstances a contract may be implied. Blackburn J., indeed, distinguished that case from *Harris* v. *Nickerson*, on the ground that there the sale was advertised as "without reserve." This amounted to a representation that the auctioneer was instructed to sell "without reserve," and if that representation was fraudulent (of which the buying in would be good evidence, as the employment of a puffer at a sale by auction is evidence of fraud: *Green* v. *Baverstock*, 14 C. B. N. S. 204, 11 W. R. C. L. Dig. 12), the auctioneer would no doubt be liable. But in *Warlow* v. *Harrison* the auctioneer was sued in contract, and it is difficult to see how an advertisement that there will be a sale *without reserve* can make a contract, if an advertisement that there will be a sale does not. The distinction seems to be rather that which we have pointed out, namely, that in *War-*

low v. *Harrison* the goods were actually put up for sale and bids taken, in which case ordinarily there could be no contract to sell implied, because of the well understood customary power of the auctioneer to buy in; but there was room for implying it from the use of the words "without reserve." In another view, indeed, the absence of these words is of weight, because without them, even if the auctioneer had put up the goods for sale, he might, consistently with *Warlow* v. *Harrison*, have bought them in, and so defeated the buyer's expectations; which would make it impossible for the buyer to prove he had sustained any damage by his not putting them up. But, except indirectly, this does not touch the question of whether the *advertisement* made a contract with every one who came to the sale. Until *Warlow* v. *Harrison* is over-ruled (and some doubt was thrown upon the decision in the recent case) it must be considered that where goods are actually put up "without reserve," and bid for, the auctioneer is bound to knock them down to the highest bidder; but there is no reason for carrying the doctrine one step further, and the cases of *Harris* v. *Nickerson* and *Spencer* v. *Harding* must put an end to the fantastic idea of suing upon an *advertisement* of an auction.

We may observe that it is pointed out in a note to *Frost* v. *Knight*, L. R. 5 Ex. 337, that in some systems of law a remedy seems under some circumstances to be given to one to whom an offer is made, which is retracted before he accepts it; but there is no trace of any such right being allowed by the English law, nor does the mischief which such a rule seems designed to remedy appear to be equal to the inconvenience which it would cause.—*Solicitors' Journal.*

Lord Selborne's ideas upon the subject of trial by jury may be gathered from what fell from him in the *Patent Marine Inventions Company* v. *Chadburn* (see Notes of the Week). An application was made to his Lordship to have issues in a patent cause relating to novelty and infringement tried by a jury. Indirecting that the trial should take place before the Judge without a jury, Lord Selborne said that the Judge could keep the evidence better under control when sitting alone, and that upon any questions of science the Judge was as competent as a jury to form an opinion. If trial by jury is to be judged upon such grounds, it will speedily decay. In every case, probably, a judge, by keeping all the evidence in his own head, would keep it better in hand than if it had to be submitted to a jury, and probably in a vast number of cases the opinion of one man is as good as that of twelve. The question is, whether, in important causes involving evidence which may have a different effect upon different minds, it is not expedient that the tribunal to decide them should comprise a jury.—*Law Journal.*

CANADA REPORTS.

ONTARIO.

NOTES OF RECENT DECISIONS.

COMMON PLEAS.

Easter Term, 1873.

McGuire v. McGuire.

Married Woman—Right to maintain trover against husband for goods possessed by her before marriage—Consol. Stat. U. C. ch. 73, & 35 Vict. ch. 16—Construction of.

Held, that a married woman who, without any just cause, leaves her husband's house and lives apart from him, cannot in virtue of Consol. Stat. U. C. ch. 73, in connection with 35 Vict. ch. 16, bring an action against him as for the wrongful conversion by him of certain goods, chattels, and household furniture, which having been the property of the wife before marriage, came into the actual possession of the husband upon and in virtue of the marriage, and were used by husband and wife jointly subsequently to the marriage at the dwelling house of the husband, until she chose to separate herself and live apart from him, by reason that upon her demand, after her departure from his house, he refused to give her up the goods to take away with her.

Feaver v. Montreal Telegraph Company.

Telegraph Companies—Failure to transmit message—To whom liable—Contract.

One F., at Hamilton, delivered to the defendants a message to be transmitted to plaintiff, at Wakefield, Mass., paying for the transmission. The defendants having failed to deliver the same to the plaintiff, he brought an action against them for damage caused thereby.

Held, following *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, that the defendants' liability arose only from contract; that as the message was sent by F. on his own account, and not on behalf of the plaintiff, there was no privity between the plaintiff and the defendants, and the plaintiff could not maintain an action against the defendants for their negligence.

Robinson v. Shistel.

Services performed in expectation of marriage.

Held, that services rendered for a person in expectation of marriage do not afford the ground of an action, as upon an implied assumpsit to pay in money.

Ahrens v. McGilligat, (Grand Trunk Railway Company, Garnishees.)

Railway Companies—"Live and carry on business" at head office—Jurisdiction of Division Court—32 Vict. ch. 23, sec. 7, O.—Construction of.

Held, that a Railway Company does not "live and carry on business," within the meaning of 32 Vict. ch. 23, sec. 7, O. at any other place than at its head office, at which its business is managed.

Where the garnishees had their principal station at Montreal, and a local station at Berlin at which they took passengers and received goods, and a cause of action having arisen against the defendant, the plaintiff issued a garnishee summons against the company out of the said Division Court at Berlin, on the ground that they lived and carried on business there.

Held, that the judge of the Division Court had no jurisdiction to try the cause.

Vars v. The Grand Trunk Railway Co.

Railway Companies—Placing hand-car on highway—Liability.

Some men in defendants' employment, who had been using a hand-car for laying down rails, approached the Colborne Station on their return home, about 5 p. m., and finding the railway track occupied by a train, stopped at a highway crossing, about 400 yards from the station. They removed the car from the rails and placed it on the highway, the car encroaching some 6 or 10 inches on the road-way The men then left it, remaining away about half an hour. Two men seeing the car seated themselves upon it. At this time the plaintiff drove past in his carriage, and his horse shying at the car, ran away, threw plaintiff out, and severely injured him.

Held, that the placing of the car on the highway constituted negligence, for which the defendants were responsible.

The President, Directors and Company of the Bronte Harbour v. White.

Harbour Company—Express power to distrain—Right to maintain action in addition—3 Vict. ch. 33—Construction of.

By 3 Vict. ch. 33, the plaintiffs were incorporated under the name of the President, Directors and Company of the Bronte Harbour, and were declared to be capable by such name of contracting and being contracted with, suing and being sued, pleading and being impleaded in all courts in all manner of suits, actions, complaints, matters, and causes whatsoever. By the 2nd sec. they were authorized to construct a harbour and by the 7th sec. it was further enacted, that if any person should neglect or refuse to pay the tolls or dues, which by the Act were vested in the plaintiffs as their property, the plaintiffs might distrain the goods on which the tolls or dues *were due and payable*, until such tolls should be paid.

Held, that the plaintiffs were not confined to the remedy by way of distress; but could also maintain an action.

Zealand v. Dewhurst.

Husband and wife—Goods supplied to wife not living with husband,—Liability of husband.

In an action against a husband for goods supplied to his wife, it appeared that up to February, 1872, when the husband received an appointment worth $1,200, he had been in embarrassed circumstances, and owed debts amounting to $3,000. In May, 1870, his wife being in delicate health went to live with her father at Brantford, and continued to reside with him for two years with the exception of an occasional visit to her husband, who lived in St. Catharines, during which time the father expended on her and her son upwards of $1,00 . In May, 1872, when visiting her husband she complained for the first time of wanting clothes, her husband appearing to have always furnished her with money and clothes whenever she asked for them, and also to have paid for the son's board and clothes; the husband then gave her what articles she required and what money he possessed, at the same time expressly telling her not to incur any debts in Brantford. It appeared, however, that in the following month she incurred the debt now sued for, consisting of silks, valuable laces, and shawls, amounting to the husband's salary for the quarter, the plaintiff at the time being fully aware that she was living, not with her husband, but with her father.

Held, that the husband was not liable.

CHANCERY CHAMBERS.

Clariss v. Ellis.

Order 113.—Decree nisi—Effect of proceeding under.

[The Referee—October 1, 1873.]

Proceedings under a decree which is not absolute, are invalid.

The purchaser at a sale under such a decree was refused a vesting order, though offering to waive all objections to the proceedings, it being considered that it was only the defendants who could waive such an objection.

Cameron v. Eager.

Abatement by bankruptcy of a plaintiff—Costs.

[The Referee—October 2d, 1873.

The bankruptcy of a sole plaintiff causes an abatement of the suit.

A motion by a defendant to dismiss after such abatement and before revivor was refused; his proper course being to call upon the assignee of the plaintiff in insolvency to revive within a limited time.

The plaintiff, the insolvent, was awarded his costs of the application to dismiss.

Abel v. Hilts.

Motion for production or committal upon default—Notice required.

[The Referee—October 21, 1873.]

A motion for production, with the alternative that the party be committed in default, being substantially a motion to commit, requires four clear days' notice.

De Blaquiere v. Armstrong. Armstrong v. Deedes.

Consolidation of suits, effect of—Motion for leave to appeal.

[The Referee—October 25, 1873.]

By a decree made in *De Blaquiere* v. *Armstrong* it was ordered that that suit be consolidated with a suit of *Armstrong* v. *Deedes*. One of the parties had a different solicitor in each suit. *Held*, that subsequent proceedings must be carried on in the suit in which the decree was made, and that the solicitor in that suit was the proper solicitor to be served with notice of further proceedings, and not the solicitor in the suit of *Armstrong* v. *Deedes;* the consolidation being held to constitute a stay of proceedings in that suit.

On a motion for leave to appeal after the lapse of the time limited for that purpose, reasonable and probable grounds must be shewn by the affidavits. It is not sufficient merely to state the grounds of the proposed appeal in the notice of motion.

Hamelyn v. White.

Vacating order pro-confesso—Defences which may be raised in an answer filed—Ex gratid.

[The Referee—Oct. 10; Strong, V. C., Oct. 27, 1873.]

An order *pro confesso* was vacated and a defendant allowed to file an answer notwithstanding great and unexplained delay, no sittings of the Court having been lost thereby.

The Referee refused to allow the defendant to set up a defence amounting to a plea to the jurisdiction as not being a meritorious defence, according to the practice at law, (see Lush Pr. 447.) But on appeal Strong V. C., reversed this part of the order of the Referee, and allowed the defence to be set up.

REVIEWS.

The Canadian Monthly and National Review. Adam, Stevenson & Co., Toronto.

The Publishers, in their announcement for 1874, very naturally congratulate themselves on the success they have achieved so far. This monthly is undoubtedly highly favoured by being under the editorial management of one of the greatest masters of the English language, who himself contributes largely to its pages. It is stated that the periodical criticism upon national affairs, under the caption of "Current Events," will continue, and that the same impartiality of discussion will be adhered to in the treatment of all questions under review. We trust this may be so, and that there will be an avoidance of anything like siding with any political party, and this we believe the writer earnestly desires. We are told, however, that the atmosphere is at present highly charged with an unsavoury smell, said to have the flavour of political rancour, and that there is a fear that it may penetrate even to the judicial mind of this most able critic. However, having no nose for such matters, and not being able to see the length of that organ, except in things appertaining to the law and its administration, we cannot offer an opinion on the subject—we can, however, assert most positively, that we wish the *Canadian Monthly* a continuance of that success which has so far attended it, and an ever increasing circulation in this Canada of ours.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 37th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

No. 1270. Maxwell D. Fraser.
Rupert Etheredge Kingsford.
Joseph Benjamin McArthur.
Roger Conger Clute.
Charles Oakes Zaccheus Ermatinger.

No. 1275. Nathaniel F. Hagle.

And the following gentlemen received Certificates of Fitness:

Maxwell D. Fraser.
George B. Gordon.
Hammel Madden Deroche.
Charles E. Barber.
} Without oral examination.

Edward Harry D. Hall.
Kenneth Maclean.
Charles Oakes Z. Ermatinger.
Henry Theophilus W. Ellis.
Charles Bagot Jackes.

And on Tuesday, the 18th November, the following gentlemen were admitted into the Society as Students of the Laws:

University Class.

Richard W. H. N. Dawson.
John E. K. Gourlay.
F. M. Morson.
Robert Shaw.
William H. Culver.
Frank S. Nugent.
Robert E. Wood.
John L. Whiting.
Walter Barwick.
Francis Madill.
Alexander C. Galt.
James H. Madden.
Peter L. Palmer.
Charles L. Ferguson.
Richard P. Palmer.
Albert A. F. Wood.

Junior Class.

Trevelyan Ridout.
James V. Teetzel.
John Alexander Palmer.
Harry Dudley Gamble.
George Edgar Millar.
Lorenzo Udolphus C. Titus.
Ralph Winnington Keefer.
Oliver Richard Macklem.
James Norris Waddell.
James Rymal.
Henry Ryerson Hardy.
Robert Conolly Miller.
E. Sydney Smith.

The above names are all given as on the rolls, and not in order of merit.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

INDEX.

PAGE.

Abatement—By Bankruptcy of plaintiff - Costs 363
Motion to dismiss after, refused 363
Abstract of Title—*See* Vendor and Purchaser.
Acceptance—*See* Contract.
Accident—*See* Burden of Proof.
Account—*See* Bank—Husband and Wife—Injunction.
Accountant's office—Clerk in—Description 302
Accumulation—*See* Will.
Action at Law—*See* Bill in Equity—Damages—Injunction—Nonsuit.
Adding Parties—*See* Amendment.
Additions, Curious legal 2
Ademption—Testator's advances and gifts to wife and children, after date of will, held not part of shares under will 90
See Legacy—Will.
Administration of Justice Act considered 109, 135, 139, 335
Construction of Statute, sec. 59-64 ..... 165, 198
See Executor and Administrator
Administration of Justice in Toronto 338
Administrator—Representation of insolvent estate 191
Admiralty—*See* Burden of Proofs—Jurisdiction.
Advance—*See* Ademption—Copyright.
Advancement—Cottage purchased in name of son as trustee for his father 299
See Cy Pres.
Adverse possession—*See* Trespass to Land.
Advertisement on Sale—Misdescription 159
Affidavit—
Commissioner—Swearing before law partner 212
Entitling of 191
Entitling in insolvency 314
In reply—Cross-examination on 313
Filing on return of summons 50
Taken before a notary public in America, at place one hundred and twenty miles distant from British Consul 299
See Production of documents.
Age—Presumption of law as to child bearing 213
Agent—Service on Toronto agent—*See* Notice to plead.
See Husband and Wife—Principal and Agent.
Agreement—*See* Contract.
Alimony, Interim—*Prima facie* case for 192
Allotment—*See* Company.
Amendment—
Adding and striking out parties under the common order 313
Failure to make in time 52
Striking out portions of bill—Costs 161
See Law Reform Act—Writ of summons.
Annuity—Construction of will—Absolute gift 90
See Payment—Penalty.
Answer—Leave to, after order pro confesso 363
See Married Woman—Supplemental answer.

PAGE

Appeals—
From Judges in England ... 37
Costs in cases of—considered ... 306
Appeals (Chancery)—
Applications in the nature of—Irregular filings—Jurisdiction of Referee ... 159
Costs of reference under a decree reversed ... 192
Leave to—Application for—Delay ... 318, 368
Appeal Bond—Regularity of—Entitling ... 160
Appeals, (Error and Appeal)—
Struck out as not set down in time—Respondent's costs ... 211
Appeals, (General Sessions).
Preliminary objections to right of entering ... 238
Appointments—
Failure to comply, with terms of—Next of kin ... 90
Husband and Wife ... 213
Judicial—Oxford and Cambridge Universities ... 154
Of Negroes to the Cabinet in U. S. ... 44
To office ... 371
See Power—Settlement
Arbitration—Prejudiced Arbitrator—Revoking submission ... 237
Quasi Arbitrator not liable for want of skill or for negligence, if acting honestly 299
See Broker.
Arrest, Law of ... 222
Assault—Indecent assault on boys ... 299
Assessment—
Of Bank Stock—whether assessable as personal property ... 259, 261, 277, 294
Mere possession of land without estate ... 27
Form of roll when two persons assessed on same land ... 27
Assumpsit implied—*See* Master and servant.
Assignee—*See* Bankruptcy.
Assignment—*See* Bankruptcy—Distress—Lease—Property.
Attachment—*See* Bankruptcy.
Attachments of Debts—Division Court Jurisdiction ... 104
Attorney—Admission as—Decisions relating to ... 225
Liability of, for the acts of clerks ... 25
See Carrier—Mercantile agency—Privileged communication—Solicitor.
Auction—*See* Order of court—Vendor and purchaser.
Autumn Assizes, 1873 ... 223
Average—Partial or total loss—Sale by court ... 213
Award—*See* Penalty.
Balance of purchase money—*See* Purchase money.
Bailment—Colorable transactions—Bailee's title ... 90
See Contract—Carrier.
Bank—Bills deposited as security for particular and debt held for general account ... 300
Entitled to set off indebtedness at one branch against deposit at another branch 300
See Husband and Wife.
Bank stock—Assessment of—*See* Assessment.
Bankruptcy—
Assignment of property—Act of Bankruptcy ... 90
Composition—Failure to pay instalment ... 213
Drawing balance from Bank, knowing that bankruptcy impending is an act of ... 300
Effect on contract ... 300
Goods transferred to credit of a bankrupt on the books are not "in possession" within the Act ... 300
Money paid by a creditor to obtain possession of goods, in ignorance that owner was bankrupt, repaid ... 90
Mortgage to secure repayment of debt—Creditor's right to cease with discharge of debt ... 90
Partner knowing his firm is insolvent, and transferring partnership assets to personal creditor, commits fraud ... 90

PAGE

Bankruptcy (*Continued*)—
Uncertified bankrupt cannot sue in Chancery 90
What is an act of..... 213
Indictment for conspiracy to remove goods before.. 325
See Abatement—Bills and Notes—Insolvency—Principal and Agent—Priority—Settlement.
Bar of Canada at Privy Council..... 137
Bar of England, The..... 198
Bar Unbent, The..... 125
Barristers—Admission of to foreign Bars..... 246
See Contempt of Court.
Bench and Bar..... 49
Bench and Bar of Quebec 86
Benjamin, Judah P..... 153
Bequest—*See* Appointment—Contributory—Devisee—Executor and Administrator—Legacy—Power—Will.
Bill of costs—Substituting new bill..... 23
Bill in Equity—
Action at law—Injunction..... 213
Dismissal of—*See* Dismissal of Bill.
See Executor and Administrator—Injunction.
Bill of Lading—
Construction of—"Steamer"..... 91
See Bailment—Charter party—Salvage.
Bills and Notes—
Action on a promissory note—Set-off—Equitable defence..... 91
Bottomry bond collateral with note—Proceeding taken on..... 91
Specific appropriation to meet 300
Accomodation—Principal and Surety..... 309
See Bankruptcy—Contract—Lien—Limitations, Statute of.
Bill of Sale—*See* Description.
Biographia Juridica, Foss and his..... 251
Bond—Void on payment by instalments not within the Statute of Limitations..... 135
See Appeal bond—Bottomry—Security.
"*Bovill* Patent," The 225
Breach of Promise—*See* Evidence.
Broker—Contracting for fruit, not liable for error in judgment as to average quality.. 213
False representation, purchaser liable for goods bought under 91
Burden of proof—Rule of proving blame and inevitable accident in Courts of Admiralty and Common Law..... 91
By-Law—Repeal of..... 188
To recoup an individual money advanced for a railway..... 188
Cancellation—*See* Will.
Cargo—Description of—Necessity which justifies master of ship in selling goods of absent owner 91
See Charter Party—Insurance—Lien.
Caricature—*See* Copyright.
Carriage by Water—Agreement to pay shortage—Set off..... 310
Carrier—
Railway company not liable for bullock killed in consequence of "his inherent vice" 213
Railway company not liable for injury happening from the "proper vice" of a horse while in their charge..... 213
See Bill of Lading—Carriage by water—Negligence.
Cattle—Owner not bound to fence out his neighbors..... 64
Cause of action—*See* Change of venue.
Certiorari—
To Magistrate to return conviction—Precedents..... 237
From Division Court—Variance between declaration and claim..... 238

PAGE

Chambers (Chancery)—
When decree against infants made in 54
Chambers (Common Law). *See* Judge in Chambers.
Champerty—Agreement to give half of property obtained by contesting will is Champerty.. 300
Channel, Sir William—Death of..... 101
Change of venue—*See* Venue.
Charity—*See* Legacy—Perpetuity.
Chancery—
Appointments 3
Autumn Circuits, 1873 223
Spring Sittings, 1873..... 70
Summary jurisdiction of..... 73
See Appeals—Chambers.
Charter Party—
Effect of—Exception of—Danger of the seas—In bill of lading... 214
Neglect to load—Notice of readiness..... 214
Person shipping on behalf of party abroad liable for a breach of charter party occurring before cargo was loaded..... 91
Shipowner liable to charterer for damages caused by unfitness of his vessel..... 91
Chattel mortgage—*See* Distress—Husband and wife.
Cheque—Giving of—When no assets to meet it..... 57
Child-bearing—*See* Age.
Chose in action—*See* Executor and administrator—Husband and wife.
Church—*See* Streets.
Class—*See* Devise—Legacy.
Clay—*See* Mines.
Clearing Land—*See* Damages.
Clubs—The law of.....183, 258
Collision—
Position of vessels—Blame for..... 214
Tug entitled to salvage, though some of her owners owned the vessel which caused the accident. 214
See Negligence.
Commission—*See* Witnesses.
Commitment—*See* Conviction.
Company—
Libel—Costs of prosecution—Objects of association..... 214
Shareholder liable till transfer registered..... 214
Deposit of title deeds—Equitable mortgage.. 214
Winding up—Allotment of Shares 214
Winding up equivalent to dismissal of manager 214
See Contract—Specific performance.
Compensation—Effect of conveyance or vesting order..... 159
Composition—*See* Bankrupt.
Compromise—
Court to ascertain the *bona fides* and truth of claim and counter-claim.....214, 215
See Ejectment.
Condition.—*See* Contract.
Condition Precedent—*See* Contract.
Conditional Gift—*See* Perpetuity.
Condonation—*See* Guarantee.
Consolidation of Suits—
Suit in which subsequent proceedings must be carried on..... 368
Constable—Fine, Tender of, to..... 190
Construction—*See* Ademption—Annuity—Appointment—Bankruptcy—Bill of Lading—Broker—Charter party—Company—Contract—Contribution—Devise—Easement—Executors and Administrators—Frauds, Statute of—Insurance—Jurisdiction—Lease—Legacy—Mines—Power—Principal and agent—Settlement—Street—Will.

PAGE

Contempt of Court—
Out of Court, inferior Courts have no power to punish ... 306
Privilege of Members of Parliament ... 264
Speeches at public meetings pending trial ... 182, 264
Extent of fines ... 264
Contract—
Avoidance of, by fraud ... 57
Condition precedent—Partial performance ... 301
Construction of, whether for Court or jury ... 215
Failure to remove coal as agreed does not justify cancelling contract ... 301
For parliamentary and departmental printing ... 310
For shoes for French army—Right to reject those with paper soles ... 92
Railway—Certificate of Engineer a condition precedent—Waiver of—Pleading ... 311
Of allotment of shares when complete ... 92
Of drunken man, voidable ... 301
Responsibility under, as depository for encashment of bills ... 92
See Bankruptcy—Bill of lading—Broker—Charter party—Company—Covenant—Damages—Evidence—Foreign government—Frauds, Statute of—Insurance—Law, mistake of—Letter—Lien—Negligence—Partnership—Sale—Specific performance—Vendor and Purchaser.
Contribution—Real estate not liable to ... 215
See Devise.
Contributory Negligence—*See* Negligence.
Conversion—*See* Trover.
Conviction—Setting aside—Variance between it and warrant of commitment ... 237
See Certiorari.
Cooper, Charles Purton—Death of ... 165
Copyright—
Infringement of ... 301
Infringement of copyright of title of book ... 215
None in an advertisement ... 215
Corporate seal—How far essential to a contract ... 22
Corporation—*See* Specific Performance.
Correspondence—
Law Society primary examination ... 331
Mayor, voting for—Procedure ... 66
Professional etiquette ... 34
Cross-examination on affidavits—Uncertain abode ... 160
Costs—
Limiting time for putting in security for ... 193
Married woman ... 193
Staying proceedings until paid ... 191
To be included in tender after suit brought ... 212
See Amendment—Appeal—Attorney and client—Company—Copyright—Dismissal for want of prosecution—Execution—Ejectment—Set off—Taxation.
Counsel—*See* Privileged communication.
County Judges—Meeting of ... 225, 247
Covenant—
Not to build within half a mile—How half mile measured ... 301
Void as in restraint of trade ... 301
See Bankruptcy—Contract—Easement—Ejectment—Lease—Settlement.
Criminal Courts—County Judges ... 197
Criminal Justice—Administration of ... 140
Criminal treatment and prison punishments ... 229
Cross-examination—Licence in ... 307
Cross Remainder—*See* Legacy
Crown Land—Mere possession of will not give qualification ... 27
Cushing, Mr. Caleb—Scandalous observations of ... 198
Curiosities of legal additions ... 2
Cy Pres—Advancement—Power to purchase commission in army ... 301

PAGE

Damages—
Contract price and market price—Measure of damages.. 301
For detention of goods on railway..... 215
For taking coal from the colliery of another without fraudulent intent..... 301
Injury to premises—Compensation..... 215
Land held on precarious tenure..... 215
Liability of owners of vessel for breach of contract..... 302
Liability of person setting fire to land for the purpose of clearing it 312
Liquidated damages..... 301
Measure of damages..... 302
Repudiation of contract—Measure of damages..... 92
See Charter-party — Carrier — Collision — Contract — Negligence —Nuisance—Penalty—Principal and Agent—Trespass.

Damage Feasant—*See* Distress.
Danger of the Seas—*See* Charter-party.
Death—*See* Negligence.
Declaration—Date of..... 312
Decree against infants—*See* Infants.
Decree Nisi—Proceedings under invalid—Vesting order refused..... 363
Dedication—*See* Way.
Deed—*See* Mortgage—Married woman.
Demand of Possession—*See* Ejectment.
Demurrage—*See* Charter-party.—Damages.
Descriptions of land—Points of compass..... 308
Deterioration—*See* Vendor and Purchaser.
Detinue—Notes held by trustees—Agency..... 215
See Judgment.

Devise—
Ultimate limitation—Remainder..... 92
Estate tail—Personal estate..... 93
For life with contingent remainders..... 216
Surviving children..... 92
Tenants in common..... 92
In tail male..... 215
Of leasehold to daughter—Devise over void for remoteness..... 215
Mortgage debt does not pass by devise of freehold houses..... 302
Specifically devised and undevised real estate..... 302
Contribution to all daughters who shall attain the age of twenty-one or marry.... 216
See Ademption — Annuity — Appointment— Distress —Contribution— Executor and Administrator—Legacy—Payment—Power—Will.

Dinners—Important considerations suggested by..... 125
Director—Breach of duty in a director in allotting shares to infants..... 320
See Company.

Disclaimer—*See* Quo Warranto.

Dismissal of Bill—
For not amending in time... 52
For want of prosecution—Costs..... 313
Excuse for delay..... 313
See Abatement.

Dismissal of Petition, for want of prosecution..... 192
Disobedience of Master's direction..... 192
Distance—*See* Covenant.
Distress—Goods warehoused, when privileged from..... 302
Damage feasant—Seizure of cattle as a..... 64
Power, of over lands void, for uncertainty of description..... 93
See Ejectment—Harbour Co.

Distribution—*See* Will.

PAGE

Division Court Accommodation—*See* Certiorari.
Divorce—*See* Settlement.
Dog—*See* Master and Servant.
Documents—
Inspection of—Protected documents ... 216
Production of—*See* Production of Documents.
Domicile—*See* Executor and Administrator.
Drains—*See* Negligence.
Drunkenness—*See* Contract.
Dumpor's Case considered ... 345
Dwelling-Place—*See* Shop.
Easement—Right of way—Lease ... 93
To have rain drop on neighbour land, not destroyed by raising height of eaves ... 302
See Damages—Trespass.
Editors, passage of arms between ... 246

EDITORIALS—
Accident Insurance Act ... 284
Administration of Justice Act ... 109, 138, 335
Administration of Justice in Toronto ... 338
Appeals from the Court of Revision ... 245
Appeals to the Privy Council ... 277
Assessment of Bank Stock ... 277
Attachment of Debts—Division Court Jurisdiction ... 104
Attorney, Admission of ... 225
Bar of England, The ... 198
Barristers, Admission to Foreign Bars ... 246
"Bovill Patent," The ... 225
Canadian Bar at Privy Council ... 137
Chancery Appointments ... 3
Channel, Sir Wm. Fry—Death of ... 101
Chief Justice of England and Mr. Cushing ... 198
Contempt of Court ... 5, 182
Cooper, Charles Purton—Death of ... 165
Corporal Punishment ... 1
Costs of Cases of Appeal ... 306
County Judges' Criminal Courts ... 197
County Judges' Salaries ... 245
Courts of Manitoba ... 12
Criticisms on the Reporters ... 177, 249
Curious Misprint ... 1
Death of Sir Charles *Marshall* ... 137
Decisions in Nova Scotia ... 74
Delegation of Judicial Functions ... 198
Division Court Accommodation ... 139
English Appeals ... 37
English Bench—Recent Vacancies in ... 333
English Law—Following the ... 33
Evidence Act of Ontario ... 147
Goodhue Will Act ... 237
Honyman, Sir George, Q.C.—Appointment of ... 75
Honour to whom Honour is due ... 226
Increase of Judges' Salaries ... 138
Insolvent Act—Decision in Nova Scotia ... 198
Insult to a Judge ... 102
James, Mr. Edwin—Refused Re-admission ... 197
Judges in Manitoba ... 279
Judges' Report on the Goodhue Bill ... 33

PAGE

EDITORIALS (*Continued*)—

Judgment of Mr. Dalton, in *Dain* v *Gossage* 165
Judgment of Privy Council in *Dundas* v *The Hamilton, &c., Co'y* 166
Judicial Comments in *McLean* v *McKay* 278
Judicial Salaries 1
Judicial Service—Length of 74
Judicial Suggestions for Law Amendments 38
Landlord and Tenant 166
Law of Arrest 226
Law Books—New 246
Law of Costs 2
Law Reform in England 2-103
Law Reporting in Illinois 75
Law School—The 4
Law School—Inaugural Address 105
Law School Lectures 305
Law School—Rules of the 43
Law Scholarships 11
Law Society 10, 43, 85, 166, 227, 334
Law Society Examinations—Table of days for 118
Law Society—Secretary of 73
Law Students and Debating Societies 7
Lawyers of Colour 44
Legal Additions (curiosities of) 2
Legal procedure 76
Lieber, Francis—Notable Jurist—his death and works 101
Long Judicial Service in Canada 137
Ludlow, Mr. Justice 166
Lushington, Hon. Stephen—Death of 73
Mansfield, Lord—Letter of 74
Married Women's Act of 1872 102
Married Women—Their Rights 41
Martin, Baron, Retirement of 245
Measuring Distance (restraint of trade) 38
Medico-Legal Men 278
Meetings of County Judges 225, 247
Mingle, Mangle 333
Missing Library Books 138
Modern Jargon 37
New Ontario Election Acts 249
Notices to Subscribers 1
Ontario Election Act 249, 279
Passage of Arms between Editors 246
Points connected with the Law of Letters 76
Pollock, Baron—Appointment of 38
Practice in Probate Courts 197
Professional Etiquette 278
Queen's Counsel, appointment of 3, 178
Registrar's Clerk in Chancery 73
Registrar and Record and Writ's Clerk 165
Reporters and Text Writers 155, 339
Resumè of Proceedings of Benchers last Term 10, 85, 227
Romilly, Lord—Retirement of 137
"Single-seated Justice" in Criminal Cases 140
"Social Evil," The—Law in St. Louis 333
Sobut's Summary Jurisdiction of the Court of Chancery 73
Statute Law—Concerning 39
Surgical Definitions 197
Travelling by Rail 77, 143, 170, 202

PAGE

EDITORIALS (*Continued*)—
United States Law Serials 73
Walkem's Treatise on Law of Wills..... 305
Westbury, Lord..... 245
Wills Act of 1873 ..... 167, 199
Wills—Difficulty in Interpreting..... 334

Ejectment—
Executors—Admissions—Compromise..... 217
Better particulars of Title—Application before appearance..... 211
Lease—Demand of Possession—Necessity of joinder of plaintiff at trial..... 190
Lease—Proviso for re-entry, and power to determine.. 189
Married Woman—Practice..... 312
Security for Costs—Costs of former action paid.. 212
Stay of proceedings till costs of former action paid..... 302
Waiver of breaches of covenant..... 93
See Insurance—Landlord and tenant.

Election—*See* Quo Warranto.
Election Acts—Ontario..... 249, 279
Eloquence—Forensic, discussed..... 184
Endorsement of name of Solicitor on papers—Irregularity..... 161
English Bench—Recent Vacancies 333
English Law—Following the..... 334
Entirety of Contract—*See* Contract.
Equitable Security—
Depositee not bound to examine deeds—Priority 325
See Bill in Equity—Bills and Notes—Partnership—Settlements—Specific Performance.
Estate for life—*See* Annuity—Legacy.
Estate tail—*See* Devise—Legacy.
Estoppel—*See* Guarantee—Insolvent Act of 1869—Married woman—Purchase money—Trespass to land.

Evidence—
Commission to examine witnesses in Quebec..... 312
Unstamped policy, admission of claim under... 93
Breach of promise of marriage abroad, proof of 93
See Burden of proof—Damages—Executor and administrator—Libel—Negligence—Stamp—Trover—Vendor and purchaser.
Evidence Act of Ontario—The last.. 142

Execution—
Time when it may issue after revision of taxation..... 237
Time for issuing for costs of day after taxation..... 237

Executor and administrator—
A judgment is *prima facie* evidence of debt..... 217
Assets employed in trade—Unauthorized expenditure..... 325
Probate refused to person precluded from property passing under will..... 93
Disposition of residuary estate..... 217
De son tort—Plea that defendant not executor 325
Facts showing liability as..... 217
Legacy of wife dying intestate part of estate of husband..... 93
Liabilities of 291
Plene administravit—Assent of creditors and misapplication of assets..... ... 325
Revocation of a will as to personalty revokes the appointment of 93
See Husband and wife—Payment—Power—Will.

Fact, Mistake of—*See*—Insurance—Mistake—Vendor and Purchaser.
Fair comment—*See* Libel.
Fee fund—Costs of guardian *ad litem* when paid out of the..... 161
Felony—*See* Nonsuit.
Female lawyers..... 47

PAGE

Fences—Liability of owner to repair..... 64
Filing papers—*See* Appeal (Chancery)—Notice of filing petition.
Final judgment—*See* Judgment.
Fines, tender of—*See* Constable.
Fire—*See* Damages.
Fishery Act (31 Vict. ch. 60 c.)—Warrant may issue in first instance under..... 190
Fixtures—Looms attached with bolts are fixtures..... 94
Foreign government—Decree against, in absence of..... 94
Forgery—*See* Guarantee.
Fraud—Signature to negotiable instrument obtained by..... 235
See Bailment—Bankruptcy—Settlement—Sale of goods—Voluntary settlement.
Frauds, Statute of—Sufficiency of memorandum of contract to satisfy the..... 94
Fraudulent preference—*See* Bankruptcy—Trade mark—Voluntary settlement.
Freight—*See* Cargo—Insurance—Mortgage.
Funeral orations—Prevalence of, in the United States..... 235
Garnishee—*See* Railway Company.
General Average—*See* Average—Arbitration—Insurance.
General Sessions, appeal from..... 238
See Petty Sessions.
Gift—*See* Advancement.
Goodhue Bill—Judges' report on the..... 83
Goodhue Will Act..... 2, 37
Guarantee—Action for a forged guarantee..... 312
Liability of master, who guaranteed honesty of servant, for second embezzlement 94
Guardian—Authority of survivor of two guardians to nominate another..... 94
C. L. Court has no discretion to refuse *habeas corpus* to enable guardian to obtain ward..... 325
Guardian *ad litem*—*See* Fee fund.
Habeas corpus—*See* Guardian.
Harbour Co.—Right of to bring action when empowered to distrain..... 362
Hawkins, Mr.—His Hogarthian sallies..... 271
High schools—*See* Trustees.
Highway—Obstruction of—*See* Railway—Way.
Honyman, Sir George, Q.C.—Appointment of..... 75
Honour to whom honour is due..... 226
Hotchpot—*See* Will.
House—"Boat" when a "house"..... 251
"Church" is a house..... 329
Husband and wife—
Gift to wife..... 217
Goods supplied to wife..... 362
Purchase of goods and chattel mortgage by wife—Agency implied—Evidence..... 309
Trover by wife against husband..... 361
Receipt of money by wife as agent of husband..... 328
See Executors and administrators—Marriage Settlement.
Immediate Sale—*See* Sale.
Incomes—Lawyers'..... 256, 286
See Legacy.
Indecent assault—*See* Assault.
Indictment—*See* Bankruptcy.
Inevitable accident—*See* Burden of proof.
Infants—Decree of foreclosure against, under order..... 54
Reversion charged with maintenance of..... 217
Allotment of shares to..... 320
See Guardian.
Instrument—*See* Copyright—Patent.

PAGE

Injunction—
To restrain actions in New York on bills accepted and dishonoured in London... 325
To restrain corporation (which had compulsory powers in a borough) from supplying gas in a neighbouring township..... 325
To restrain waste by tenant for life..... 95
See Company—Copyright—Insurance—Nuisance—Trade mark.

Injury—*See* Carrier.

Innkeeper—*See* Lien.

Inspection of Documents—*See* Documents, inspection of—Privileged communications.

Insolvency—
Priority between attachment creditor and assignee..... 74
Decisions in Nova Scotia..... 198
Delivering goods to real owner—Entitling affidavits..... 314
Estoppel—Finality of proceedings in insolvency..... 309
See Bankruptcy.

Insurable interest—*See* Insurance.

Insurance—
Accident..... 284
Cancellation of policy for misrepresentation—Proper tribunal..... 326
For benefit of wife..... 293
Marine Policy—Alteration of policy..... 94
Foreign law..... 95
Goods not declared upon the policy, usage..... 326
Misnomer of vessel..... 95
Homeward voyage when commenced..... 95
Wrecked while loading..... 217
Withholding information—Estoppel..... 326
Value of current policy in life insurance company..... 94
See Average—Bill in Equity—Priority.

Interest—Trustee for company paying own money for company entitled to interest..... 327
See Limitations, Statute of.

Interrogatories—
Discovery of documents, &c.—C. L. P. Act. sec. 189-190..... 259

James, Mr. Edwin—Application for reinstatement..... 124, 169

Joint Tenant—*See* Legacy.

"Jolly testator who makes his own will"..... 125

Judge—Insult to..... 102

Judge in Chambers—Power of to set aside final judgment..... 50

Judge's notes to be furnished with his report in cases of prohibition..... 191

Judgment—Setting aside—Affidavit wrongly entitled..... 191
In former action—Plea in bar..... 217
See Judge in Chambers.

Judicial Comments in *McLean* v. *McKay*..... 278

Judicial Functions—Delegation of..... 198

Judicial Salaries..... 1

Judicial Service—Long..... 74, 137

Judicature Bill in England discussed..... 187
Sketch of the bill..... 103
Supreme Court of..... 149

Juries..... 150

Jurisdiction—
Refusal to entertain on special cases fictitious questions of law..... 326
See Bill in Equity—Injunction—Insurance—Venue, Change of.

Jurisdiction in Chambers—*See* Chambers (Chancery)—Judge in Chambers.

Justification—Plea of—*See* Libel.

Kenyon, Lord—Incident in the life of..... 308

Land—What is land under 25 & 26 Vict. C. 102..... 326

PAGE

Landlord and Tenant ... 166
Acceptance of rent—Receipt of after time ... 311
Election to determine tenancy ... 35
Liability of former to keep premises in repair ... 189
See Distress—Ejectment—Lease—Legacy—Light and Air.
Law Amendments—Judicial suggestions for ... 38
Law Books—New ... 246
Law Reform in England—Observations of Mr. *Jessell* ... 2, 103
Law Reform Act—
Expediting clause—Amendment ... 259
Postponing trial ... 259
Law reporting in Illinois ... 75
Law Scholarships ... 11
Law School of Ontario—
The scope and advantage of ... 4
Inaugural address ... 105
Lectures—When they commenced ... 305
Rules of the ... 48
Law Serials in the United States ... 73
Law Society—
Easter Term, 1873 ... 166, 227
Examinations—Table of time for ... 118
Hilary Term ... 42, 86
Michaelmas Term, 1873 ... 334
Resumè of proceedings ... 10, 85, 227
Rules for candidates for admission ... 33
Library Books missing ... 138
Law Students and Debating Societies ... 6
Law of Wills—*Walkem's* Treatise on ... 305
Lawyers in Parliament ... 1a2
Lease—Charge upon renewal of ... 214
Breach of covenant not to assign ... 218
Lessee of mines need not leave support for the surface, but must pay damages in case of injury ... 218
See Contract—Easement—Ejectment—Mines.
Legacy—
Advances to sons—Hotchpot—Deduction ... 217
Bequests to hospitals—Impure personalty ... 95
Bequest of personal estate to purchase land for town ... 95
Bequest to wife to accumulate during life of husband ... 218
Children of testator's brother, who died 15 years before will was made, held entitled to share ... 218
Construction—Survivor ... 429
Devise of wife's patrimony—Free occupancy of house—Tail male ... 218
Division of a legacy left to Kent Hospital, there being three hospitals of that name ... 218
Implied cross-remainders—Cumulative bequest ... 95
Married woman—Lapsed legacy ... 218
Next of kin entitled as joint tenants ... 327
See Ademption—Annuity—Appointment—Devise—Executor and Administrator.
Legal Additions—Curiosities of ... 2
Legal Procedure ... 76
Letters—Some points connected with law of—Contract by ... 71
Contract by—Time when binding ... 132
Person applying for shares in a company by letter, when bound ... 327
Letters—*See* Evidence—Frauds—Statute of Frauds—Privileged Communications.
Libel—
Fair comment on public men—Function of Jury ... 296
General plea of justification—Criminal charges ... 315

PAGE

Libel (*Continued*)—
Law of, and the O'Keefe case 233
Libellous words in a letter must be proved, not what witness conceived to be substance 219
Privileged criticism on matters of national importance 219
See Company.
License—*See* Realty.
Lieber, Francis—His death and his works 101
Lien—
Innkeeper's upon hired piano for guest's board 219
On cargo for drafts against consignees 219
See Bank—Company—Set off—Vendor and Purchaser.
Life Estate—*See* Annuity.
Light and Air—Interference of landlord with tenants 263
Limitations—
Statute of Compulsory payment of interest 95
How set up in mortgage suit 221
See Injunction—Partnership—Trespass.
Liquidated Damages—*See* Damages—Penalty.
Loan—*See* Bank.
Local Masters—Taxation of bills by—*See* Taxation.
Ludlow, Mr. Justice 166
Lushington, Dr.—Notice of 73, 118, 154

Magistrate—*See* Certiorari.
Maintenance and Education—*See* Infant—Settlement.
Mandamus—To build Bridge—Authority of County to build 310
Manitoba—Courts of 12
Judges in 279
Mansfield, Lord—Letter of as to Dallas' reports 74
Marriage—Services in expectation of 362
Married Woman—Bound by estoppel—Deed executed by her 219
Next friend—Security for costs 192
Order allowing to execute a deed without her husband's joining 313
Parties to a foreclosure—Separate answer 159
Their rights—Proposed legislation 41
Trover against husband 361
See Age—Ejectment—Husband and Wife—Settlement
Married Woman's Act of 1872—Recent decisions 102
Marshalling Assets—*See* Devise—Contribution—Legacy.
Marshall, Sir Chas.—Death of 137
Martin, Baron—His Retirement 245
Master—Deputy, in Chancery.
Committal for disobedience of—Direction of a—Evidence of default 192
Reference back to a Master—Jurisdiction of Referee 312, 313
Master and Servant—
Knowledge of latter construed to be knowledge of former, as to ferocious dog 95
Services in expectation of marriage—Implied assumpsit 362
See Guaranty—Seduction—Negligence—Principal—Agent.
Mayor—Mode of voting for 66
Measurement—*See* Covenant.
Measuring Distance 38
Medico-Legal Men 278
Members of Parliament—*See* Privilege.
Mercantile Agency Co.—
Receipts for business entrusted to them 161
Liability of, for acts of their attorney 161
Mesne Profits—*See* Ejectment.
Messages—*See* Telegraph Co.

PAGE

Mines—
Lessees not liable for subsidence of soil caused by mining operations 219
Reservation of minerals, includes china clay 219
See Damages—Lease—Negligence—Trespass.
Mingle, Mangle 333
Minor—*See* Guardian.
Misdescription in advertisement on sale 15
Misnomer—*See* Insurance.
Misprint—Curious 1
Mistake of Law and not of fact 95
See Insurance.—Vendor and Purchaser.
Misrepresentation—*See* Trover.
Modern jargon 37
Morgan, Mr. H. J.—Notice of 135
Mortgage—
Of vessel—Right of first Mortgagee to tack 96
Trust deed or Mortgage—Merger 372
See Bankruptcy—Company—Devise—Equitable security—Fixtures—Priority and Purchase-Money.
Mowat's Administration of Justice Bill 135
Municipal Law—*See* Assessment—By-law—Mayor—Street.
Municipality—*See* By-law.

Ne Exeat—May be issued before day of payment, if defendant is about to leave the country. 327
Negligence—
Accidental escape of water from water closet 96
In construction and obstruction of culvert 309
Evidence of contributory 298
Flooding mine—Unskilful working—Canal 327
Instant death—Loss of service—Burial fees 327
Railway Company liable for accidents caused by fences being out of repair 327
Railway Company—Injuries to persons travelling on free pass 327
Of Railway officials 96
See Arbitration—Burden of proof—Carrier—Principal and Agent.
Nelson, Mr. Justice—His retirement 99
Never indebted to action on Covenant—*See* Pleading.
New trial—Rule for rescinded for non-payment of costs 56
See Nonsuit.
Next Friend—*See* Married Woman.
Noise—*See* Nuisance.
Nonsuit—Action of Trover—Evidence tending to prove felony 96
Notary Public—*See* Affidavit.
Notice of Filing—Service of—Irregularity 160
See Priority.
Notice to plead—Eight days to town agent, under 34 Vict. c. 125, s. 12 O, set aside 191
Notice to quit—Service of, on daughter of tenant 219
Notice to Subscribers 1
Notice of trial—Informal notice—When required to be given 237
See Service of papers—Style of Cause.
Nova Scotia—Decisions in 74
Nuisance—Caused by noise and vibration of engine in adjoining house 327

Obligations—Personal character of 17
Order of Court—Property ordered to be sold by—Failure to sell—Resale 327

Parliamentary Printing—*See* Contract.
Particulars of title—*See* Ejectment.
Parties—*See* Amendment—Subpœna.
Parties to foreclosure—*See* Married woman.
Partner—Affidavit taken before 212

PAGE

Partnership—
Inalienable government contract by one partner, part of firm's assets 219
Interest allowed to partners on their respective advances..... 328
Practice in equity where remedy at law—Statute of Limitations..... 220
Right to participate in profits does not necessarily create partnership..... 220
Right of surviving partner to assets..... 238
Surviving partner is not a trustee..... 238
Who may file a bill against to account..... 238
See Bankruptcy—Executors and Administrators.
Passage Money—*See* Insurance.
Patents for land—
Construction of—Description of land..... 308
What improvements may be subject of..... 96
Patents of invention.—*See* Trade-mark.
Payment—Cancellation of debt not "payment in cash."..... 220
To husband of balance of annuity due deceased wife..... 328
See Principal and agent.
Pedigree—*See* Documents, Inspection of.
Penalty—
For non-payment of annuity..... 328
See Damages.
Perpetuity—
Immediate gift for charitable purposes..... 328
See Devise.
Personal Estate—*See* Devise.
Personalty—*See* Realty.
Petitions—Practice as to filing—Dismissing for want of prosecution..... 192
Petty Sessions—Contradictory orders of—Quashing..... 32
Place of Abode—*See* Costs.
Pleading—
Multiplying pleas—Common Law capacity..... 251
Pleading several matters—*See* Insolvent Act.
See Charter-Party—Executor and Administrator—Notice to plead.
Policy—*See* Insurance.
Pollock, Baron..... 38
Possession—
Delivery of, not be made against stranger to suit..... 212
Adverse—*See* Trespass to Law.
Demand of—*See* Ejectment.
Posting Letter—*See* Letter.
Postponing Trial—*See* Law Reform Act.
Power—
To appoint, by deed or instrument in writing, exercised by will..... 220
Delegated power and subsequent appointment..... 220
Execution of—Will..... 220
Of sale, to be exercised by an administrator, *durante minore ætate*..... 220
See Age—Appointment—*Cy Pres*—Debt—Preferred Claim—Probate—Settlement Specialty—Stamp.
Practice—*See* Appeal (Chancery)—Declaration—Endorsement—*Ne-exeat*—Notice to plead—Principal and Agent—Sale.
Presumption—*See* Principal and Agent.
Principal and Agent—
After *bona fide* payment to agent it is too late to come upon principal..... 96
Agent's authority to bind principal..... 220
Guarantee—Implied authority..... 328
Liability of railway for employee's act..... 96
Purchase of shares—Sale at advance..... 328
Railway employee—Inference of authority..... 328

PAGE

Principal and Agent (*Continued*)—
Railway company liable for mistake of station inspector, in arresting a passenger. 328
See Broker—Cargo—Master and Servant.
Principal and Surety—*See* Bills and Notes—Surety.
Priority—Double assignment of money payable on sale of an army commission..... 329
Mortgage of life policy—Bankruptcy..... 329
See Equitable Security—Mortgage.
Privilege of Members of Parliament from arrest..... 264
Privileged Communications—
Communications with counsel with view to obtain legal advice..... 220
Documents between defendants and agents, *ante litem motam* 220
Letters passing between solicitor and client before litigation commenced..... 220
See Production of Documents.
Privy Council—
Appeals to the..... 277
Judgment of..... 166
Probate—Administration with will annexed of married woman, refused..... 97
See Executor and Administrator.
Probate Courts—Practice in..... 197
Procedendo—See Certiorari.
Process—Abuse of—Costs of day..... 191
Pro confesso—Vacating order—Leave to answer..... 363
Production of Documents—
Committal for non-compliance with order for..... 363
Joint interest of party and stranger 191
Materiality of the issue in the cause..... 192
Proper mode of contradicting an affidavit on production..... 313
See Privileged Communications.
Profession—*See* Mortgage.
Professional Etiquette..... 278
Prohibition—
County Court—Set off—Jurisdiction..... 191
See Judges' Notes.
Promissory Note—*See* Bills and Notes.
Prosecution—*See* Petition.
Prosecution of Suit—*See* Dismissal for want of.
Proof—*See* Executor and Administrator—Stamp.
Protest—*See* Bills and Notes.
Proviso—*See* Devise.
Public Men—*See* Libel.
Punishment—Corporal..... 1
Purchase Money—
Action for balance of—Receipt under seal for whole—Estoppel..... 188
Registry of Mortgage for balance of..... 161
Payment of incumbrances out of..... 212
Purchaser—*See* Vendor and Purchaser.

Qualification of Reeve—*See* Municipal Law.
Quebec—Commission to—*See* Evidence.
Queen's Counsel—Appointment of..... 8, 187
Queen's Speech 124
Quit, Notice to—*See* Notice to quit.
Quo Warranto—Disclaimer—After issue of writ..... 283
Railway Bonus—Application for—Enquiry into election..... 191
Railway Company—
Travelling by rail—Incidents and accidents 77, 143, 170, 202, 362
Service of Garnishee process..... 362
Detention of Goods—Damages..... 215
See By-Law—Negligence—Principal and Agent.

PAGE

Railway—*See* Contract—Trespass.
Reading of many books—Concerning the... 23
Real Owner—Delivery of goods to under Insolvent Act of 1866... 314
Realty—Floating derick, not so attached to the bed of the river, as to be ratable as a house... 220
Recoupment—*See* Vendor and Purchaser.
Reeve—*See* Municipal Law.
Referee in Chancery Chambers—Jurisdictionof... 159, 312-313
Reference—*See* Master.
Registrar's Clerk in the Court of Chancery... 73
Registrar and Record and Writ Clerk... 165
Remainder—*See* Devise—Legacy.
Remoteness—*See* Devise.
Rent—*See* Distress—Landlord and Tenant—Lease—Vendor and Purchaser.
Replevin—*See* Distress.
Repudiation of Contract—*See* Vendor and Purchaser.
Reports—A few words about their multiplicity... 46
Reporters—Criticisms on... 177, 249
Reporters and Text Writers... 155, 339
Reporters Law- Curiosities of... 121
Re-sealing Writ of Summons—*See* Writ of Summons.
Rescinding rule—*See* New trial.
Rescission of Contract—*See* Contract—Vendor and Purchaser.
Reservation—*See* Mines.
Residuary Estate—*See* Ademption—Annuity.
Residuary Legatee—*See* Executor and Administrator.
Reversion—*See* Infant.
REVIEWS—
American Law Review... 163, 223, 331
Blackwood's Magazine... 243
British Quarterlies for October, 1872... 35
Canadian Monthly and National Review... 69, 363
Clarke on Insurance... 330
Clarke's Treatise on Criminal Law... 66
Cunningham's Reports... 273
Brown on Fixtures... 93
High on Injunctions... 223, 303
Law Magazine and Review... 223
Legal Chronicle... 70
Les Ans Du Roy Richard le Second... 271
Married Woman's Property Act, by *J. R. Griffith*... 68
Dillon's Municipal Corporations—Treatise on the Law of... 69
Ontario Law List... 275
Practice of the High Court of Chancery... 272
Revue Critique... 271
Sir George Cooke's Reports... 274
Sir Robert Brooke's New Cases... 275
Taylor on Investigation of Titles... 240
Wright on Criminal Conspiracies... 241
Revision Court of—Appeals from the service of notice... 245
Revision of taxation—*See* Taxation.
Revivor—Order of, when not obtainable *ex parte*... 52
Application for—Entitling of... 52
Application to set aside should be to Court... 52
Revocation—*See* Executor and Administrator—Will.
Riparian Rights—Action for obstructing flow of water... 329
River—*See* Riparian Rights.
Romilly, Lord—Retirement of... 137
Salaries, Judges—County Judges—Increase of... 245

PAGE

Sale—
Law of Scotland, in case of purchase of goods by sample..... 221
Opening biddings—Special grounds..... 192
Sale—Immediate after order fixing date of payment..... 160
Verbal promise to purchase for benefit of another at sheriff's sale..... 297
See Bankruptcy—Contract—Vendor and Purchaser.
Sale of Goods—Fraud in..... 57
Schools—*See* Trustees.
Sealed Instrument—*See* Specific Performance.
Seals—Concerning..... 45
Security—*See* Appointment—Bank—Equitable Security.
Security for Costs—*See* Costs.—Ejectment.
Seduction—Proof of Service..... 97
Senate of United States—Number of Lawyers in the..... 293
Service of Papers—Putting paper under door of office..... 212
See Notice to Plead—Notice of trial.
Service of Garnishee process—*See* Railway Co.
Set-off—Lien for costs..... 97
See Bank—Bills and Notes—Carriage by Water—Company Payment.

SELECTIONS—
Bar Unbent, The..... 125
Bench and Bar..... 49
Bench and Bar of Quebec..... 86
Benjamin, Judah P..... 153
Concerning the Reading of Many Books..... 23
Concerning Seals..... 45
Corporate Seal—How far essential to a contract..... 22
Criminal Treatment and Prison Punishment..... 229
Curiosities of the Law Reporters..... 121
Dumpor's Case..... 345
Edwin, James..... 124
English Bar—Decentralization of..... 120
Forensic Eloquence..... 184
Foss and his "Biographia Juridica"..... 251, 283
Funeral Orations..... 235
Jolly Testator, who makes his own will..... 125
Judicial Appointment of Oxford and Cambridge Graduates..... 154
Juries..... 150
Kenyon, Lord..... 308
Ladies of the long robe..... 47
Law of Clubs..... 188, 258
Lawyer's Incomes..... 256
Lawyers in Parliament..... 152
Liability of Attorneys for the acts of clerks..... 25
Liabilities of Executors..... 291
License in Cross-examinations..... 307
Lushington, Dr., Genius of..... 154
Lushington, The late Dr..... 118
O'Keefe Case and the Law of Libel..... 233
Personal character of Obligations, The..... 17
Proof of Telegraphic Messages..... 123
Queen's Speech..... 124
Reports—A few words about many..... 46
Reporters and Text writers..... 339, 155
Signature to negotiable instrument obtained by fraud..... 235
Solicitor and Client—Communications between..... 359
Smith, John William—Sketches of his life..... 14
Suing upon an advertisement of an auction..... 360
Supreme Court of Judicature Bill, The..... 149
"The Great Unpaid"..... 153

PAGE

SELECTIONS *(Continued)*—
Trial by Jury—*Lord Selborne* on 361
Truth in the witness box 123
Westbury, Lord 292
Wickens, Vice-Chancellor 344

Settlement—
Covenant in marriage articles to settle real estate 221
Husband's right to wife's income after separation 221
Husband and Wife—Sale of realty—Conversion into personalty against the heir. 221
Life interest forfeitable in bankruptcy—Power of appointment 221
Of property without fraudulent intent held void 97
Wife obtaining a divorce entitled to the whole of her property 221
See Legacy—Power—Trust—Voluntary Settlement.

Shareholder—*See* Company.

Ship—*See* Bill of Lading—Bottomry Bond—Burden of Proof—Charter-Party—Insurance—Jurisdiction—Mortgage.

Shop—Hall for accommodating cattle not a "shop" 221

Shortage—*See* Carriage by Water.

Single Seated Justice in criminal cases 140

Smith, John William—Sketches of his life 14

Social Evil, The—Law in St. Louis 333

Solicitor—Deceased, a partner of two firms, liability of surviving members 160
See Privileged Communications.

Solicitor and Client—Communications between 359
See Privileged Communications.

Specialty Debt—Re-payment of advances to tenant for life, as against 221
See Advance—Appointment.

Specific Appropriation—*See* Bills and Notes.

Specific Performance—
Delivery of abstract of title 29
Money contract, not enforceable in equity 97
See Contract—Law Mistake of—Vendor and Purchaser.

Spring Assizes, 1873 70

Stamp—Presumption of use of upon lost document 221

Statute—*See* Guardian—House—Payment—Power—Principal and Agent—Street—Succession—Voluntary Settlement.

Statute of Frauds—*See* Frauds, Statute of.

Statute Law, Concerning 38

Statute of Limitations—*See* Limitations, Statute of—Partnership.

Stay of Proceedings—*See* Ejectment.

Steamships—*See* Bills of Lading.

Stream—*See* Riparian Rights.

Street—Ground separated from public highway by a gutter, not a street 222
Limitation line for building on 329

Stoppage in Transitu—*See* Bankruptcy.

Style of Cause—Notice of trial set aside as containing wrong 212

Submission—*See* Arbitration.

Subpoena—
To another province, may include parties 159
To another province—"Suit pending" 159

Succession—
English Succession Duty Act—Investment in funds 97
Property liable to succession duty 222

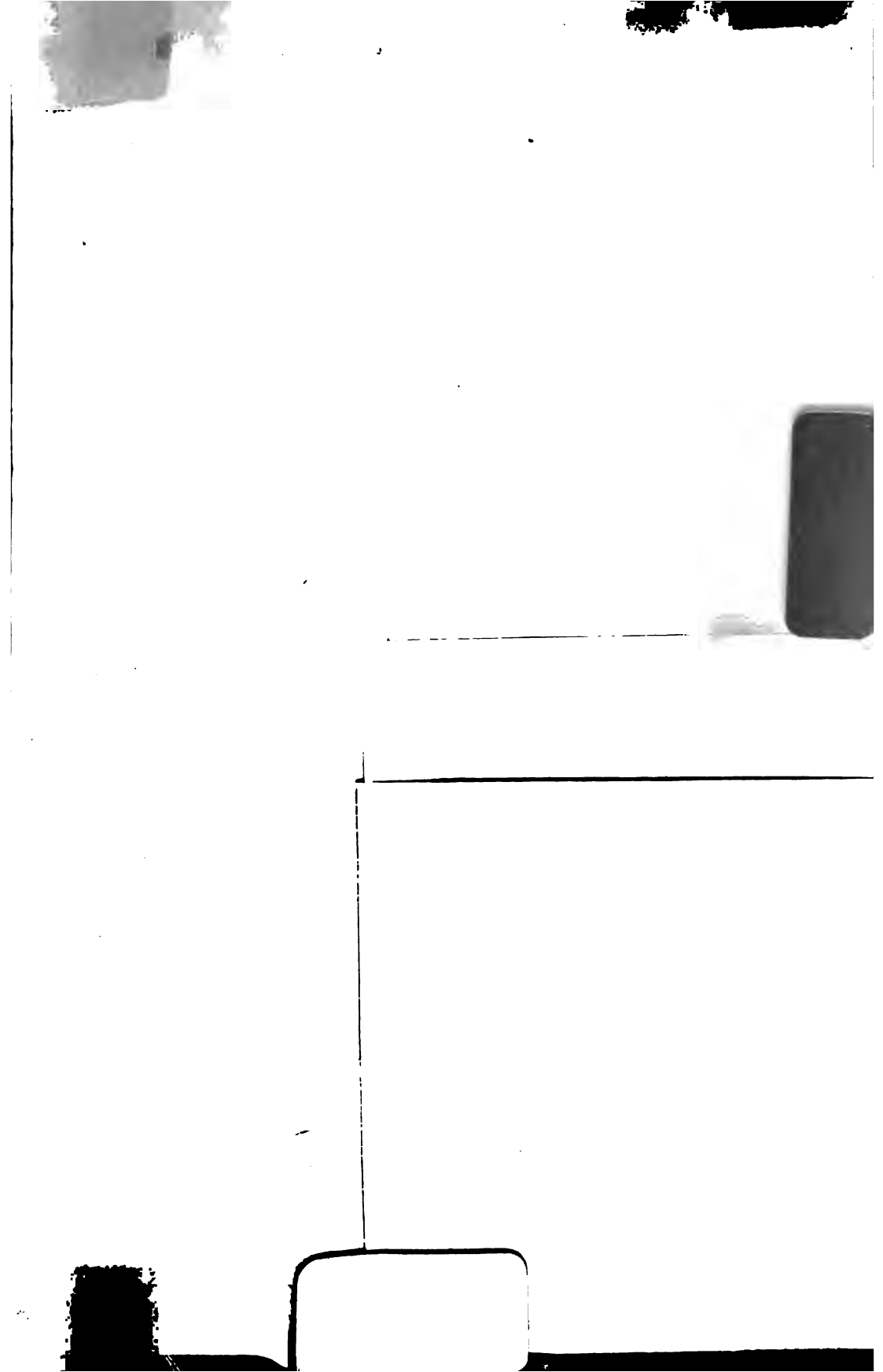
Suing upon an advertisement of an auction 360

"Suit pending,"—*See* Subpoena.

Supplemental Answer—When application should be made 313

Surety—Dealings between creditor and principal 329
Directors of Insolvent Company, payment of dividend to 222
Notice to terminate liability—Pleading 329
See Bills and Notes—Guarantee—Interest.

PAGE
Surgical Definitions 197
Surrender—*See* Mortgage.
Tacking—*See* Mortgage.
Tax—*See* Succession.
Taxation of costs—
Power on revision to restore items struck out 55
Telegraph Company.
Failure to send message 361
Responsibility of, for correctness of messages 132
Time when contract becomes binding by telegram 132
Proof of telegraphic messages 123
Rejecting messages—*See* Contract.
Tenant—*See* Landlord and Tenant.
Tenant in common—*See* Legacy.
Tender—After suit brought, requisites of 212
See Constable.
Testamentary capacity—*See* Will.
"The Great Unpaid" 159
Time to plead—*See* Notice to plead.
Toll—Abolition of tolls at Brecon—Railway 329
Tort—*See* Judgment.
Total loss—*See* Insurance.
Trade—*See* Covenant—Distress.
Trade mark—
Denoting peculiar kind of salt allowed 222
Infringement of 97
Inventor of name and trade mark is entitled to injunction, if mark adopted by another person 222
Trade—*See* Insolvent Act—Settlement.
Travelling by rail 77, 143, 170, 202
See Railway.
Trespass—
Adverse possession 56
Of cabman on railway company's land 330
Overflow of water by mining operations into neighbouring mines 97
Adverse possession as wrongdoer 56
Estoppel by deed 56
Limitations, Statute of 56
See Damages—Negligence.
Trial—Public speeches pending—Contempt of court 264
Trial by jury, Lord *Selborne* on 361
Trover—Declaration of intention to distrain not evidence of conversion 330
Fraudulent misrepresentations—Payment by unproductive cheque 57
For goods sold through fraudulent misrepresentation 58
See Broker—Nonsuit.
Trust—Laying out trust funds to increase value of estate 338
Marriage settlement—Resulting trust 98
Trust moneys received from two trustees and paid over to one 330
Personal liability of trustees for money advanced by them 222
See Annuity—Charge—Executor and Administrator—Legacy—Partnership—Set-off—Settlement—Succession.
Ultra vires—*See* Company.
Unstamped instrument—*See* Evidence.
Variance—*See* Certiorari—Conviction.
Vendor and purchaser—
Abstract of title—Failure to show title 98
Contract entered into by mistake, through advertisement, rescinded 90
See Purchase money—Specific information.
Venue—Change of.
One party living out of the Jurisdiction 191
Cause of action—Balance of convenience 160
Verdict—*See* Indictment.
Vested, Interest—*See* Succession.

PAGE
Vesting Order—Refused where sale made under decree nisi 363
Waiver—*See* Ejectment.
Ward—*See* Guardian.
Warrant—*See* Fishing Act.
Waste—*See* Water.
Water—*See* Riparian Rights—Trespass.
Way—Footpath ploughed up, right to throw down fence to avoid obstruction 330
See Easement.
Westbury, Lord 245, 292
Wickens, Vice-Chancellor 344
Will—
Difficulty in interpreting 334
Division of accumulated income advances brought into hotch pot ..... 22[2]
Not revoked by being torn up under mistaken impression that it was invalid 98
Testamentary capacity 319
See Ademption—Appointment—Contribution—Devise—Executor and Administrator—Guardian—Legacy—Payment—Power.
Wills Act of 1873 ..... 167, 199
Willes, Mr. Justice—His recent violent death 49
Winding-up—*See* Company.
Witnesses—*See* Evidence.
Witness box, Truth in the 123
Writ of Summons—Amending of—Resealing 238
Words—*See* Carrier—Contract—Devise—House—Insurance—Legacy—Realty (Derrick)—Settlement—Shop—Suit pending.

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